

A REVIEW OF REGULATORY REFORM PROPOSALS

HEARING

BEFORE THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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CONTENTS

Opening statements:	Page
Senator Johnson	1
Senator Carper	2
Senator Portman	5
Senator Heitkamp	7
Senator Lankford	8
Senator Enzi	22
Prepared statements:	
Senator Johnson	41
Senator Carper	42
Senator Heitkamp	44
Senator Warner	144

WITNESS

WEDNESDAY, SEPTEMBER 16, 2015

Hon. Susan E. Dudley, Director, Regulatory Studies Center, and Distinguished Professor of Practice, George Washington University	10
Sidney A. Shapiro, Frank U. Fletcher Chair of Administrative Law, Wake Forest University School of Law, and Vice President, Center for Progressive Reform	12

ALPHABETICAL LIST OF WITNESSES

Dudley, Hon. Susan E.:	
Testimony	10
Prepared statement	46
Shapiro, Sidney A.:	
Testimony	12
Prepared statement	126

APPENDIX

Case Western Reserve article submitted by Hon. Dudley	54
Regulatory Science and Policy article submitted by Hon. Dudley	86
Statement submitted for the Record from Michael Greenstone, Milton Friedman Professor of Economics, University of Chicago, Director, Energy Policy Institute at Chicago	145
Responses to post-hearing questions submitted for the Record:	
Hon. Dudley	151
Mr. Shapiro	155

A REVIEW OF REGULATORY REFORM PROPOSALS

WEDNESDAY, SEPTEMBER 16, 2015

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:04 a.m., in room SD-342, Dirksen Senate Office Building, Hon. Ron Johnson, Chairman of the Committee, presiding.

Present: Senators Johnson, Portman, Lankford, Enzi, Ayotte, Ernst, Carper, and Heitkamp.

OPENING STATEMENT OF CHAIRMAN JOHNSON

Chairman JOHNSON. Good morning. This hearing will come to order. I want to welcome our witnesses for the first time and thank you again for your appearance here, taking the time, and for your thoughtful testimony. I think this is going to be a really good hearing. It is an important hearing.

Coming from a manufacturing background, coming from a business background, I certainly understand what it is like when you are trying to run a business, when you are trying to create products, how sometimes, oftentimes, maybe universally, having to comply with Federal regulations, as much as we all know we need some, takes time. And as we have seen over the decades, as we have developed layer upon layer upon layer of rules and regulation and law, sometimes often conflicting, sometimes totally contrary to, one department versus the other, it creates an awful high level of uncertainty, which I think is harming economic growth.

One of the things as a businessperson I have done a lot is strategic planning, and I can go through a quick strengths weaknesses, opportunities, and threats (SWOT) analysis on the American economy. Let me just quickly go through that.

I am just going to concentrate on the strengths and weaknesses side. I would say our No. 1 strength as an economy is we are the world's largest. We are the world's largest customer. That is an enormous advantage in global economic competition. Now, trust me, as a manufacturer, manufacturers want to be close to their customers.

Our other, I think, enormous advantage is we have relatively cheap and abundant energy. Again, coming from a manufacturing background, if you want to manufacture products, you need power. And, by and large, cheap power is better than expensive power. Now, we all want a clean environment. We need to be environ-

mentally sensitive. But I think we can have a strong economy and a clean environment. We have to balance the costs versus the benefits of that. But the fact of the matter is, in order to have a clean environment, you need a strong economy. You have to be able to afford the luxury of the pollution controls to keep your environment clean. So we need a strong economy.

Our weaknesses, certainly we have a completely uncompetitive tax situation, and Senator Portman had a great hearing here on the uncompetitive nature of our tax system in his Permanent Subcommittee on Investigations. So we have an uncompetitive tax system.

For example, if you are a global company, a global manufacturer, and you want to come and manufacture close to the world's largest customer, are you going to site your plant in Toronto with the top business tax rate of 15 percent or Detroit at 35? As Senator Claire McCaskill said in that hearing, it is just math. We have to benchmark that.

And then the whole purpose of this hearing is the regulatory environment. The cost of regulation is onerous. We can put a chart up here. There have been a number of studies by the National Association of Manufacturers, the Competitive Enterprise Institute, and SBA pegging—estimating the cost of regulation somewhere around \$2 trillion per year.

Now, we are getting immune to these enormous numbers. What is \$2 trillion? Just a quick aside. My wife does this all the time, but if I were to give you \$1 per second, it would take me 12 days to give you a million dollars. It would take 32 years to give you \$1 billion. It would take 32,000 years to give you \$1 trillion. Just understand that, those orders of magnitude, how much \$1 trillion is.

But another way to put it in perspective is only nine economies in the world are larger than \$2 trillion. That is the extent of a regulatory burden that we are placing on the people that we really rely on to create innovative products and services that we all enjoy, that we rely on to produce the good-paying jobs that are self-sustainable in the private sector.

So we need to address that regulatory burden in a common-sense way. We need regulations. No doubt about it. Were it not for the EPA, we would still have businesses dumping benzene out their back door. So we all agree that we need regulations, but they have to be common sense, and they have to have a very strong high benefit, versus the cost. When you take a look at the layer upon layer, I think you can start arguing that we may be at the point or potentially well past the point of diminishing returns in many areas—not all but in many—and we have to be very careful of that.

So, again, I am looking forward to the testimony and to the hearing and the back-and-forth. The way we are going to do this is we have a number of Senators that have introduced pieces of legislation to address the regulatory burden, and we are going to give them an opportunity to have an opening statement, but I will first turn it over to our Ranking Member, Senator Carper.

OPENING STATEMENT OF SENATOR CARPER

Senator CARPER. Thanks, Mr. Chairman. Thanks so much for pulling this together, to our witnesses for joining us, to our col-

leagues who have introduced legislation that will be discussed in part in today's hearing. We are grateful for all of you.

Before we turn to the subject of today's hearing, I want to just take a moment and look back just a few days where Senator Johnson and I and our staff directors on the minority and majority side were privileged to join Secretary of Homeland Security Jeh Johnson and former Secretary of Homeland Security Tom Ridge in traveling to Shanksville, Pennsylvania, to visit the memorial and to participate in really a day of remembrance for folks that day who laid down their lives aboard United Flight 93 in order to make sure that that plane did not make its way to Washington, D.C., perhaps to the Capitol, where we believe it was the intended goal. It was a very moving, sobering, inspiring moment. And it was a great day for us to be able to look back and to thank and remember the people who gave their all.

Today is the second anniversary of the tragic shooting in the Navy Yard, not far from where we are located here today, where 12 lives were lost 2 years ago and several others were injured in really a senseless act of violence. And on this anniversary we remember the victims; we remember their loved ones and all those who were impacted by the tragedy. And we also remember the bravery of all those who came to the aid of others on that day. It is just an important time for us to remember the important work that we have to do in Congress and across government to protect Federal employees and Federal facilities, so I did not want to let this day pass without thinking of them and noting that.

I agree with much of what Senator Johnson has said, and we all have the chance to go to schools. I love going to the schools. I have probably been at every public school in Delaware in my time as Governor and Senator. But I love to go to schools with little kids, elementary schools, and we have assemblies, and I am sure my colleagues do this sort of thing as well. And we do Q&A, and one of the questions that is often asked by students, especially third, fourth, fifth grades, "What do you do?" And I say, "Well, I am a U.S. Senator. There are 100 of us. We work with 435 Representatives and the President and the Vice President to make the rules for our country. We call them 'laws.'"

And they say, "Oh, really? Well, what else do you do?" And I tell them, "We try to help people," and one of the best ways to help people is to make sure they have a job. And a big part of that is making sure that we are working focusing on a nurturing environment for job creation and job preservation. In our business, whether you are mayor in Gillette, Wyoming, or Governor of Delaware or some other place, if you have people working, productive lives, providing for themselves, the rest is really pretty easy. But a big part of that is access to capital—nurturing our environment and access to capital. Part of it a world-class workforce, public safety. There are many aspects. Transportation, good transportation systems. But it is also what I describe as common-sense regulation. Colleagues have heard me talk about my dad before. My dad, when I was a kid, my sister and I were kids growing up, he was always saying stuff to my sister and me about—like we would do some bone-headed stunt. He was always saying, "Just use some common sense."

“Just use some common sense.” He must have said it a million times. And I suspect Ron’s dad said that or mom said that to him a lot as well. But I learned to use some common sense. The point that he makes, and I would echo it again here, when people got up this morning, they had breakfast. The food that they ate, the milk that they drank, the juices, the fruit, it was clean, it was safe for them to consume. When people got on a train with me this morning, they knew that the likelihood was they would make it from wherever they wanted to go or needed to go, people on airplanes the same thing, people in the cars that we are driving around here. Part of what they expect is that our vehicles and modes of transportation, the food that we consume is safe for us, safe for us as consumers.

The point that my colleagues have heard me make over and over again, some people say you cannot have a clean environment and a strong economy. They say it is sort of like you have to choose one or the other. Well, that is nonsense. We can have both, and we have over the years strengthened our economy and, frankly, provided safer places for us to live, work, and breathe.

The last thing I would say is this: I sometimes explain to kids, we pass these laws, and they are like a skeleton. They are like a skeleton for what we want to do with respect to transportation, defense, farming, education, whatever. And then somebody has to come along and put the meat on the bones, and the “somebody” are the agencies usually in the executive branch of our government, and they put the meat on the bones through regulations. And it is not just a process. And a clean power plant is a good example. The EPA, what they are doing is complying with the 1970 Clean Air Act, modified in 1990 with the Clean Air Act Amendments. And from time to time they have to put some more meat on the bones or take some of meat off and put new meat on because the world in which we live changes and the threats and the nature of the missions that we face continues to change.

So do we need regulations? Of course we do. Do we need regulations that enable us to strengthen our economy and continue to grow our economy while keeping us safe? Of course we do. And it is a false choice to say that we cannot do both. We have to do both, and we need to use some common sense.

Thank you so much. And I would ask unanimous consent to enter my statement into the record,¹ Mr. Chairman.

Chairman JOHNSON. Without objection.

I will also ask for the same unanimous consent to enter mine in the record.²

As long as we are doing that, I know Senator Mark Warner has a statement that he would like to make based on his piece of legislation, so we will also enter that in the record,³ without objection.

I do want to just speak to the event in Shanksville as well, just briefly. It was inspiring. It is amazing. Out of that tragedy, you get a level of inspiration. I would recommend everybody to go to Shanksville and see that visitors center, listen to the messages, the voicemail messages of three of the passengers to their loved ones.

¹ The prepared statement of Senator Carper appears in the Appendix on page 42.

² The prepared statement of Senator Johnson appears in the Appendix on page 41.

³ The prepared statement of Senator Warner appears in the Appendix on page 144.

It is an amazing display of humanity. But it is also an amazing display of the American spirit. We are all aware of it, but to hear it again, and the wonderful speeches that day, all I can say is it is just incredibly inspiring.

So, again, I really did appreciate the Secretary inviting us to that, and it was a journey well worth taking, and I would recommend it to everybody.

With that, I think we will turn it over to Senator Portman, who would like to make some opening comments on his bill.

OPENING STATEMENT OF SENATOR PORTMAN

Senator PORTMAN. Thank you, Mr. Chairman, and thank you, Professor Shapiro and Professor Dudley, for being with us again today. We look forward to your testimony later and talking about some of these bills. And I thank Chairman Johnson because he has made regulatory reform a priority of the Committee, and we are going to be talking about a number of different bills today. A couple of them I have been involved with. I am the author of the Independent Agency Regulatory Analysis Act, which we will be talking about. My cosponsor is Mark Warner, and I appreciate the fact that the Chairman just included his statement in the record. I have it here. It is a very good statement about the need for this legislation. This has been bipartisan. It has been something that we have been working on for a few years now, really trying to build on some of the President's own comments about the need to expand the regulatory analysis to independent agencies. And I know both of you will be addressing that. I read your comments on it.

I am also the author of the Regulatory Accountability Act, which is broader legislation. It is not part of the discussion today because it is not one of these bills that has been scheduled for markup yet. But a lot of the ideas in it are in other legislation we will talk about today, and I am hopeful we can move that forward as well.

The independent agency bill is, again, common sense, I think. It is part of a recommendation from the President's Jobs Council. It is something that affirms the authority of the President to extend to independent agencies some of these same regulatory analysis and review regimes that govern rulemaking by the executive agencies, again, consistent with the President's own comments and Executive Order (EO).

It was originally on the markup for the end of July. We decided to postpone it in order to address some minor concerns of a few of my colleagues on the other side of the aisle, including Senator Heitkamp, who I see is here with us today, and Senator McCaskill wanted to have a chance to further review some specific aspects of the legislation, and they have been very supportive of the intent of the legislation. I think we have made great progress. I think we are at about, to use a football analogy, at the one-yard line now. We are definitely in the red zone. And I thank both Senator McCaskill and Senator Heitkamp for their support and work on this. Hopefully we will be able to get it over the finish line.

The independent agency bill is something that Presidents of both parties have talked about over the years, and, again, consistent with this notion that our regulators who are independent, like the Securities and Exchange Commission (SEC)—and I know you use

that as an example, Professor Dudley, in your comments today—the CFTC, and others are issuing more and more regulations, more and more major regulations, and yet are not subject to the same Executive Orders.

Four years ago, President Obama issued Executive Order 13579 saying that they should comply. Of course, he does not have the legal authority to be able to require them to comply because they are independent by definition; therefore, codifying that through the work we do here in this Committee is necessary. Unfortunately, the kind of analysis that we have seen with the executive branch agencies is just simply not being done on a consistent basis by the independent agencies.

Here are some statistics worth repeating that we will hear, I think, later today. In a recent Office of Management and Budget (OMB) report, not one of the 18 major rules issued by an independent agency in 2013 was based on a complete quantified cost-benefit analysis. The same was true in 2012 when there were 21 major rules, none with a complete cost-benefit analysis. And, by the way, you can go back to 2009 and see the same record.

A recent study commissioned by the Administrative Conference of the United States reported similar findings. Out of the major rules issued by independent agencies in fiscal year (FY) 2012, the last year which they analyzed, only one rule was supported by a partial quantification of benefits, and only six rules included a partial quantification of costs apart from paperwork burdens, which is a narrow subset of the total cost.

In its fiscal year 2014 report to Congress, the Office of Information and Regulatory Affairs (OIRA) wrote, “It would be highly desirable to obtain better information on the benefits and costs of rules issued by independent regulatory agencies. The absence of such information is a continued obstacle to transparency. It might also have adverse effects on public policy.” That is the Obama Administration OIRA.

So what does this bill do? It affirms the authority of the President to extend to independent agencies the same regulatory analysis and review regime that governs rulemaking by executive agencies. It provides that independent agencies may be required to assess the costs and benefits of a major rule. It would have independent agencies submit economically significant rules to OIRA for review. OIRA would then assess the quality of the agency’s cost-benefit analysis. So, again, for major rules only, they would go to OIRA, and OIRA would do their analysis.

The Independent Agency Act has been endorsed by a bipartisan group of former OIRA Administrators from the Clinton, Reagan, and Bush Administrations, a bipartisan group of former and current heads of independent agencies, including scholars of regulation and administrative law, the American Bar Association (ABA), the National Federation of Independent Businesses, and the National Association of Manufacturers.

One concern that some of my colleagues had on the other side of the aisle was that this bill might result in a delay of rulemaking. I have agreed to accept Senator Heitkamp’s language that would clarify that OIRA has 90 days to review the agency’s cost-benefit analysis. If that review is not completed in 90 days, the inde-

pendent agency would be deemed to have met the requirement for review. Any OIRA analysis issued after those 90 days would not be included in the rulemaking record. So that puts a deadline on them.

Another concern was that the analysis this bill lays out might be duplicative. Senator Heitkamp and I are working on language to ensure that agencies that are already engaged in this type of analysis are not required to reinvent the wheel when they submit a cost-benefit analysis to OIRA, and she may want to talk more about that later.

I look forward to continuing to work with her, Senator McCaskill, and others on the Committee, including Senator Carper, who has been a supporter of this notion of being sure you have consistency, and I appreciate that Senator Heitkamp and Senator McCaskill are committed to actually getting this to a markup in early October.

Thank you, Mr. Chairman. And, again, on the Regulatory Accountability Act, Senator King, Senator Collins, and I have recently reintroduced that bill. This is something we have worked on for 3½, 4 years. It is a comprehensive bill, again, drawing on some of the existing tools in the administrative process to basically reform the Administrative Procedure Act (APA) for the first time in decades in a significant way to ensure we have a less costly and more stable regulatory environment for job creation. That bill, by the way, is supported by 80 different trade groups, including the Chamber of Commerce, Business Roundtable, National Association of Manufacturers, and many academics and former public officials.

So I appreciate all the good work, again, that is being done by Senator Lankford, Senator Johnson, and others, and I hope we can move forward with the legislation that is before us today with a markup and then be able to actually begin to make a difference in the way that Senator Carper talked about. There is no inconsistency with having a clean environment, a safe environment, a safe workplace, and having a good economy. But it does require us to go through this cost-benefit analysis in a rigorous way.

Thank you, Mr. Chairman.

Chairman JOHNSON. Well, thank you, Senator Portman, for your efforts and leadership on this regulatory reform.

Next I will turn to the Chairman and Ranking Member of basically our regulatory reform Subcommittee, and I really want to give a shout-out in terms of I think all of your good work and efforts. And so we can kind of keep it going back and forth, I will start with the Ranking Member, Senator Heitkamp.

OPENING STATEMENT OF SENATOR HEITKAMP

Senator HEITKAMP. Mr. Chairman, we have had such a great collaboration on this Committee, and I think you see it on the Committee as a whole, and I know there are a number of people on the Budget Committee, which is chaired by Senator Enzi, who also share a commitment to real reform. And so I am going to just ask that my opening statement be placed in the record¹ and defer to my Chairman, Senator Lankford, for a description of the bills that we are working on.

¹ The prepared statement of Senator Heitkamp appears in the Appendix on page 44.

Chairman JOHNSON. Well, thank you. I am sure our witnesses appreciate that.

It is amazing what you can accomplish if you concentrate on the areas of agreement. Let us concentrate on what we agree on, and let us not exploit what divides us. So, again, I just really do appreciate, first of all this and just all of your efforts. Senator Lankford.

OPENING STATEMENT OF SENATOR LANKFORD

Senator LANKFORD. Thank you, Mr. Chairman. We have worked a lot together on this to find the common-ground areas. Regulatory reform should not be a partisan issue. It should be a conversation about how we actually deal with actual business and operations.

We have three bills that we have worked very hard together on, and let me just kind of walk through the basics of those, and then we will get quickly to our witnesses on it.

S. 1817, what we call the "Smarter Regs Act," that act just starts laying out a plan for retrospective review. We believe there should be an assumption that when every major regulation is passed there is an assumption there will be a retrospective review and that will be a time certain. So we give 10 years or less that the agency, when they promulgate the rule, they say this will be reviewed at this date. So everyone knows we are going to do a real cost-benefit analysis after the fact to really get—we know what it was estimated; then we will give 7 or 8 or 10 years, whatever it may be, whatever is set, to get the real analysis of it. And then at that time, a new date is set for the next time as well, and you just keep that going on a major regulation.

Again, what we believe is there should be this continual improvement and not to have you put a regulation in place and assume 30 years from now nothing has changed. Well, 30 years from now, things will have changed in the world, and we need to make sure there is a continual lookback on that.

Another one I want to be able to bring up to you of the three that are here is S. 1820, the Early Participation in Regulations Act. Again, we have this crazy belief that the government still is of the people, by the people, and for the people. And if it is a nation and a government of the people, by the people, for the people, that actually means people should be involved in the rulemaking process; that if an agency promulgates a rule and then it seems like everyone is trying to fight against the text of it, maybe we should back up and do an Advanced Notice of Proposed Rulemaking so that when we get into the major issues, the agency would put out the concept, and then we would have an opportunity for all the American people to engage early to say this is something handled by the States, or, yes, this is a major issue, that we need to do it, but when you do the rulemake sure it includes these areas. It will improve the inputs early on and will also allow people to be engaged in it, to have more common-sense rules come out, so when they are actually promulgated and you get to that stage, the majority of people have already looked at it and had good input, and now you really are tweaking it rather than fighting against it.

And the third one is S. 1818. This one deals with just a very basic thing that should not be a controversial thing, we believe. For the past 20-plus years, regulations have been promulgated based

on two Executive Orders, 12866 and 13563, that the President has over and over again, both Democrat and Republican Presidents, said we need some basic standards of when we produce regulations, we should consider the science; we should look at cost-benefit analysis; we should consider the best available other methods and alternatives that are out there. You should get quality public participation not only from city, State, tribal governments, but also from affected parties. You should look at scientific objectivity. These are commonly agreed on things that function under Executive Orders that have never been codified.

So our belief is, we know where we have been in the past. We do not know where we are going on this. We would like to have these commonly agreed upon principles be codified into statute, and so we know from here on out, when regulations are actually created, these basic requirements are put into place.

So, again, we feel like these are common-ground issues that Republicans and Democrats alike can wrap around and start to make some significant regulatory reforms. I look forward to the conversation today that we have had multiple times being able to look through this and also broadening this out and then to head toward a markup and try to actually put this into statute in the days ahead.

I yield back.

Chairman JOHNSON. Thank you, Senator Lankford. And, again, how many times we just hear, "This is what we can agree on," so I have to commend both of you as well as every Member of the Committee. As we have gone through these Committee markups and we have reported out now 49 pieces of legislation, pretty much on a unanimous basis, it has not always been easy. We have had one scheduled for a markup, and then we would pull it, so the parties can work with individual members as well as the administration, and we hammer out the differences, and we find the area of agreement. And he also mentioned the words "continuous improvement." As, a manufacturer, that is just ingrained in my DNA, continuous improvement. You may not solve the whole problem. You do not let the perfect be the enemy of the good. But if we can find the continuous improvement, that is the right approach.

So, again, I just want to really commend, both of you as well as the entire membership of this Committee. We have been trying to find that common ground and find those areas of agreement.

This Committee swears in. It is the tradition of this Committee. So if you would both rise and raise your right hand. Do you swear that the testimony you will give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Ms. DUDLEY. I do.

Mr. SHAPIRO. I do.

Chairman JOHNSON. Thank you. Please be seated.

Our first witness will be the Hon. Susan Dudley. Ms. Dudley is the Director of the George Washington University Regulatory Studies Center and distinguished professor of practice at the Trachtenberg School of Public Policy and Public Administration. That is a really long title. She was previously Administrator of the Office of Information and Regulatory Affairs and Director of the

Regulatory Studies Program at the Mercatus Center at George Mason University. Ms. Dudley.

TESTIMONY OF THE HONORABLE SUSAN E. DUDLEY,¹ DIRECTOR, REGULATORY STUDIES CENTER, AND DISTINGUISHED PROFESSOR OF PRACTICE, GEORGE WASHINGTON UNIVERSITY

Ms. DUDLEY. Thank you very much, Chairman Johnson, Senator Carper, and all of you, for having me today. I appreciate your interest in regulatory reform, and I am happy to respond to your invitation to talk about these specific six bills. I think they are all constructive and would contribute to what you all have been talking about: a bipartisan tradition aimed at ensuring accountable and well-reasoned regulations.

Three of the bills are aimed at retrospective review and would provide mechanisms for evaluating the effects of existing regulations and modifying them as appropriate. I think this is important. Agencies seldom look back to evaluate whether the regulations in place are achieving their intended effects.

So S. 708 and S. 1683 would establish an independent body, modeled after the Base Realignment and Closing Commission (BRAC), to review existing regulations and present recommendations to Congress. Such a commission I think would address the natural accumulation of regulations over time and offer two main advantages.

First, the independent third-party review would offer an objectivity that past efforts (which depend on regulatory agencies themselves to evaluate outmoded regulations) have lacked.

Second, as the BRAC experience showed, an up-or-down vote in Congress on the complete set of recommendations could avoid having reforms get caught up in parochial interests regarding individual rules.

I also wonder if the commission's analysis might provide insights into whether the underlying statutory authority—the skeleton that you talked about, Senator Carper—contributed to any of the undesirable consequences. Since the executive branch can only issue regulations pursuant to authority delegated by Congress, the commission's review might lead to improvements in underlying legislation.

The “cut-go” element of S. 1683 would impose additional discipline on regulatory agencies, as discussed at the Committee's recent joint hearing with the Budget Committee on regulatory budgeting concepts.

On the other hand, a one-time commission responsible for evaluating 10-to 15-year-old rules might not contribute much to better designed regulations going forward, and that is where I think S. 1817 would come in and complement this commission approach and ensure that not only are existing regulations being evaluated, but that new regulations are designed to facilitate such evaluation in the future.

Another advantage of this approach is that it focuses not just on reducing burdens, but on improving regulatory outcomes through

¹ The prepared statement of Hon. Dudley appears in the Appendix on page 46.

rigorous evaluation and feedback, and I think that was a point you made, too, Senator Carper, in your opening remarks, that we care about the benefits and the outcomes of the regulations.

Institutionalizing a requirement to evaluate whether the predicted effects of the regulation were realized would provide both a powerful incentive and the necessary information to improve ex ante RIAs. I think on this one, in addition to OIRA's role in overseeing compliance with the bill, Congress might want to assign a congressional oversight body.

Now, I recognize that accomplishing the important goals of these bills would require resources and suggest that perhaps shifting resources from ex ante analysis to ex post review would not only help with evaluation, but would improve our ex ante understanding of regulations.

The other three bills under consideration focus on enhancing analytical procedures done before new regulations are issued. As Senator Lankford said, despite enjoying bipartisan support from Presidents of both parties for the last 30 years, these procedures have not been codified in statute, and so S. 1818, the Lankford-Heitkamp bill, would do that. I think that has several advantages.

First, it would lend congressional support to the order's non-partisan principles. Many existing authorizing statutes ignore or explicitly prohibit analysis of tradeoffs, leading to regulations with questionable benefits that divert scarce resources from more pressing issues.

Second, judicial review could be valuable because agencies tend to take more seriously aspects of their mission that are subject to litigation. So like executive and congressional oversight, judicial review would likely make regulatory agencies more accountable for better decisions based on better analysis.

Third, the legislation could apply these requirements to independent agencies, and that is where the bill that Senator Portman mentioned, S. 1607, comes in. That bill, as Senator Portman mentioned, has bipartisan support of former OIRA Administrators and legal scholars. It would facilitate the Administrative Conference of the United States' recommendation that independent agencies adopt more transparent and rigorous regulatory analysis practices for major rules.

And, finally, S. 1820 would require agencies to publish an Advanced Notice of Proposed Rulemaking for major rules, which I also think is very important. Regulatory impact analyses are often done after the fact to justify decisions rather than to inform them. And I think an advance notice of proposed rulemaking (ANPRs) could be valuable for soliciting from knowledgeable parties on a range of possible approaches, on data, on models, et cetera, before particular policy options have been selected.

So, in closing, let me reiterate my appreciation for the Committee's interest in regulation and its consideration of these six bipartisan bills that I think offer constructive approaches to regulatory process reform. In addition to my written statement that provides more context for my remarks, I would respectfully offer for the record two recent writings—a little bit of self-promotion here—that may be relevant as you consider the bills. One is an article in Case

Western Reserve Law Review¹ where I review previous regulatory reform initiatives and offer recommendations going forward. And the second is a new working paper on “Regulatory Science and Policy”² in which I offer recommendations for improving how science is used in developing regulation.

And, with that, thank you very much.

Chairman JOHNSON. Thank you, Ms. Dudley. And without objection, we will happily enter those in the record.

Our next witness is Sidney A. Shapiro. Mr. Shapiro holds the Fletcher Chair of Administrative Law at Wake Forest University and is vice president of the Center for Progressive Reform. He has published numerous books and articles on regulatory law and policy and has studied and advised several Federal agencies. Mr. Shapiro.

**TESTIMONY OF SIDNEY A. SHAPIRO,³ FRANK U. FLETCHER
CHAIR OF ADMINISTRATIVE LAW, WAKE FOREST UNIVERSITY
SCHOOL OF LAW, AND VICE PRESIDENT, CENTER FOR
PROGRESSIVE REFORM**

Mr. SHAPIRO. Chairman Johnson, Ranking Member Carper, and Members of the Committee, thank you for inviting me here today to share with you my views on the proposed regulatory reform legislation under consideration by the Committee.

While it is important that agencies protect the public, these protections must be achieved in an accountable and fair manner. The role of administrative procedure is to ensure sufficient accountability and fairness. But it is possible to have too much of a good thing. While it is always available to add more procedures, we must consider the impact of doing so on an agency’s capacity to protect the public.

In short, administrative procedure seeks to advance the principles of accountability, fairness, and productivity. The administrative state will work best when administrative procedures are designed in a way that properly balances accountability, fairness, and productivity.

In recent years, however, Congress, the President, and the judiciary have imposed numerous new analytical and procedural requirements on rulemaking. In most cases, these requirements are defended as necessary for advancing accountability and fairness, but their steady accumulation comes at the cost of productivity.

As currently constituted, the rulemaking process contains more mechanisms for promoting the goals of fairness and accountability than is likely necessary. As a result, significant rules can take anywhere from 5 to 8 years, if not a decade, to complete the rulemaking. Add to this delay the 2, 3, or 4 years of judicial review which occur for almost every significant rule. During this 5-to 12-year delay, the risks that these rules are meant to address do not pause or even evaporate into the ether. Instead, the risks continue unabated, threatening the health and safety and security of families and businesses across the country.

¹ The article referenced by Ms. Dudley appears in the Appendix on page 54.

² The article referenced by Ms. Dudley appears in the Appendix on page 86.

³ The prepared statement of Mr. Shapiro appears in the Appendix on page 126.

For this reason, the American Bar Association recommends the President and Congress, I am quoting here, “exercise restraint in the number of rulemaking impact analyses, assess the usefulness of existing and planned analyses; and ensure agencies’ adherence to recommendations of the ABA and the Administrative Conference . . . pertaining to such impact analyses requirements.”

In my written testimony, I measure the legislative proposals that are the subject of this hearing against each of the three principles that undergird the administrative process: accountability, fairness, and productivity. None of the proposed reforms would improve the productivity of agencies. Instead, to varying degrees, the proposed bills are likely to reduce productivity. Likewise, the bills vary concerning the extent to which they address actual gaps in accountability and fairness that might exist in the current regulatory system. For the most part, however, the proposed legislation would reduce agency productivity for only modest and in some cases no net gain in accountability and fairness.

I would be pleased to answer questions about the specific proposed questions in the question-and-answer period, but allow me to conclude by making four general recommendations concerning regulatory reform.

First, Congress should provide agencies with the necessary resources to meet their procedural requirements and be productive. A key reason why additional procedures reduce agency productivity is because agency budgets have stagnated for years while the job at hand—more food and imported toys to inspect, for example—has grown. Agency budgets addressed to rulemaking are such a small part of the Federal budget that additional funding would simply have no significant impact on the deficit or the annual Federal budget.

Second, and particularly if budgets are not increased, Congress should free agencies from unnecessary and, more important, duplicative analytical requirements. The idea that the regulatory system is widely out of control, producing excessive regulation, is simply a myth. The regulatory system must be accountable and fair, but it also must be productive if the public is to be protected.

Third, in my mind, the most effective tool in addressing regulation that is problematic for some firms, such as smaller firms, is what in an article I called “back-end adjustments.” Agencies can and do address implementation issues on a case-by-case basis, using exceptions, time extensions, variances, and waivers. Congress should ensure that all agencies have the authority and that they are using it to ensure that regulations are both effective and not unduly disruptive to regulatory entities.

Finally, I think as has been recognized, the real need for regulatory reform substantive. For many years, regulatory agencies have been operating under statutes that have not been reviewed or refreshed for decades. The intervening years have revealed shortcomings in these statutes while new public health, safety, and environmental issues that were not initially addressed by the original statutes have emerged. In some cases, agencies lack the authority they need to tackle these issues.

Again, I appreciate the invitation to appear, and I look forward to answering your questions.

Chairman JOHNSON. Thank you, Mr. Shapiro.

The Ranking Member talked about we create these laws that are kind of like skeletons, and then we need the regulatory agencies to put the meat on the bones. I always use this example. I asked staff to do this about a year ago, so they are not up-to-date figures, but when previous Congresses passed the Patient Protection and Affordable Care Act, it was 380,000 words. A year ago, that act is now about 12 million words. So from 380,000 to 12 million. Dodd-Frank, when passed was about 350,000 words, and a year ago, it was up to about 15 million words. So that is an awful lot of meat being added to the bones by the fourth branch of government that is largely unaccountable. It is unelected, and from my standpoint that is somewhat of a problem.

Mr. Shapiro, you certainly understand the concept of productivity. I think your statement was that all the imposed new requirements, the layer upon layer, the steady accumulation of those requirements on the regulatory agencies is reducing the productivity. Don't you recognize the accumulation of layer upon layer upon layer of regulations coming out of those agencies is dramatically reducing the productivity of our economy?

Mr. SHAPIRO. Senator, I do appreciate that. Like everything in life, we need to strike an appropriate balance, and, of course, people are going to differ exactly where that balance should be struck.

I think sometimes it is very easy to look at regulatory costs. They are easily identified, and goodness knows those who have to bear those costs are happy to point them out.

What we also have to consider, however, is that when we do not regulate, we leave in place dangers to the public, and those are real dangers. People die, people are injured, people get sick, people get cancer, on and on. People eat bad food, some of whom die. And those families, those individual families end up paying those costs. They do not go away. They settle on someone. So we have to achieve an appropriate degree of regulation, but we cannot simply look at costs.

Now, I understand that there are difficulties for individual businesses. We need to strike an appropriate balance. But the productivity does have real terms, real effect on our economy and on people.

Chairman JOHNSON. Do you know of anybody who argues we should not have any regulations?

Mr. SHAPIRO. No, sir.

Chairman JOHNSON. So we all agree, the Federal Government and State governments have a role in providing regulations that obviously protect the environment, protect worker safety, protection consumer safety. The argument is over, what level and at what point do we hit the law of diminishing returns?

Do you know of anybody that does not want a clean environment?

Mr. SHAPIRO. Senator, I appreciate everyone's commitment to this, and as I say, we are going to disagree about where the appropriate balance gets struck. But with all due respect, I guess I have to take issue with your claim that agencies are largely unaccountable.

Chairman JOHNSON. I did not make that claim.

Mr. SHAPIRO. Well, people do make it. Let me give you an example. Last week or 2 weeks ago, there was an article in the Washington Post, and the Department of Agriculture (USDA) wants to propose—they have not gotten to the proposal stage yet—a rule that would eliminate one of the ways, one of the designations for the size of raisins. So raisins are graded, like all agricultural products, and the smallest of the raisins in the regulations are called “midget” raisins. They were asked to get rid of that term, and they say, “We are happy to do so. There is no one who disagrees with this. It is just a change of language.”

It has been over 2 years, and they have not gotten to the proposed rulemaking stage because they are going through all the various analytical steps that have been imposed on them, and that is something that is uncontroversial.

So I do not think from the agency’s point of view they feel like they do not do any analysis or they do not do enough analysis. They do a lot of it.

Chairman JOHNSON. Well, I would never argue that government agencies are efficient in the way they approach things.

Ms. Dudley, the BRAC Commission concept here is trying to bring some measure of subtraction to the Federal Government. Certainly what I see is everything is additive. We are legislators, so we legislate, and we just keep adding layer upon layer upon layer. I mean, at some point in time, you have to take a look and say, OK, we need to remove some of these layers; we have got clean out the garage.

Can you just kind of speak to really what the concept of that BRAC Commission would be?

Ms. DUDLEY. It actually might get to something like the raisins, because that is an example of a regulation that is in place that we need to change. And so a commission that could identify that as part of a pool of regulations that perhaps no longer are serving their usefulness, if it ever did, I think would be valuable.

And as I mentioned briefly in the testimony, I think another value of it is what we learned from the BRAC, that is, being able to vote up or down on the whole package because, otherwise, it is so easy to think about what special interest it might harm if we do this versus another one; whereas, if you look at it as a whole, it might be an efficient way to do it.

Chairman JOHNSON. One of the insights I try and provide people from the private sector, having come from it myself, is that the motivation of government agencies is the exact same thing as the private sector. They want to grow, bottom line. The difference in the private sector, in order to grow you actually had to produce a product or a service that you can create at a cost less than you can sell it. That is how you grow in the private sector.

In government, let us face it. Oftentimes not succeeding helps you to grow. You never solve that problem. You keep asking for additional resources. I mean, is that something you have noticed certainly in your capacity when you were in government, just the imperative of government agencies just wanting to grow, and expand their authority over the private sector?

Ms. DUDLEY. Well, I think another difference is that in the private sector there is that constant feedback. You have your cus-

tomers' feedback. If you do not make a product that people want, you cannot sell it, and so there is constant evaluation and feedback.

Yes, so I think that is another advantage of the BRAC Commission, is that it would step back and have a third-party evaluation. Michael Greenstein I think has said to this very Committee that point. He jokes that his wife thinks he is not capable of evaluating himself accurately and he needs a third party. I think we all do.

Chairman JOHNSON. Basically what you are referring to in the private sector, you have the discipline in the marketplace. If you do not have a successful product that people want to buy, you do not produce at a cost less than you can sell, you go out of business. You go bankrupt. Where is that discipline in the Federal Government against the agencies? Isn't that really what we are trying to address here?

Ms. DUDLEY. I mean, I think the bills that you have in front of you would address some of those things, including the—is it 1817 that would not only look back but say, going forward, we are going to create the data—or create the information that we can evaluate after the fact.

Chairman JOHNSON. I also want to address—because I think I see this. I have been very impressed with the quality of the Federal workforce, their dedication. There is no doubt about that. With that being said, I am afraid that too often in regulatory agencies, you have individuals working in those agencies that have no connection, never came from the industry they are trying to regulate. I just want both of you to speak to the level of expertise within the agencies, the bureaucrats writing the rules within industries that they really do not understand.

Ms. DUDLEY. I can tell you—

Chairman JOHNSON. Which is why you need that—

Ms. DUDLEY. Right. Anecdotally, that is what I have heard. People have come out and tried to implement the rules. They said, "Oh, my goodness, we had no idea." Part of the Labor Department, "We had no idea what this would really be like to implement in practice."

Chairman JOHNSON. Mr. Shapiro, would you like to comment on that?

Mr. SHAPIRO. Sure. As we all know, the rulemaking process sets up a dialogue between all interested parties, and most trade associations are only too happy to point out, let alone work with agency staff, concerning the implementation of rules and their objections to it. So agencies hear all of the time from these various components, but that does not mean everybody gets represented. That is why I endorse the idea of back-end review, that once the rule is in place, naturally enough, not everybody is similarly situated, and agencies ought to have the authority, if they do not already, to use various accommodation mechanisms for the particular problem of the regulated entity: "We are in Alaska. You did not take into account that the weather is cold up here, and we cannot possibly put in that piece of equipment. It will not work." And then the agency has to say, "Yes, you are right. Let us take that into account."

Chairman JOHNSON. OK. Do you have something?

Ms. DUDLEY. Just a small point. That troubles me because it seems we are moving away from the rule of law to the rule of individual exemptions. And I think it is troubling to me.

Chairman JOHNSON. And we are not seeing necessarily that back-end review being implemented properly or fairly.

Ms. DUDLEY. Well, and if you are, you are seeing it to people who are connected and may be able to get the special favors. So that troubles me because I think it is connected people get the back-end outcome.

Chairman JOHNSON. You are not saying that sometimes large organizations have an ability to utilize the regulatory framework to disadvantage their smaller competitors? I think that happens. Senator Carper.

Senator CARPER. Thanks. Thanks again to both of you for joining us today. Great to see you. And you bring a lot of expertise to an important issue, and we need that expertise.

One of the things that we try to accomplish at a hearing of this nature, as you know, is to deal with a tough issue or tough issues, to ask people who are really well schooled and bring a lot of understanding to these issues, and people who have a different perspective of how to deal with these issues. And we respect both of you enormously, and you do not agree on a number of things here.

One of the things we need to do is develop consensus around the legislation that has been introduced because we are going to have hearings—we may have more hearings, but we will have a markup. We will actually vote on this, offer amendments and so forth. I want to see how we can develop some consensus here and ask both of you to help us with that as it pertains to these pieces of legislation.

We will just start off with where do the two of you agree. Where do the two of you agree on what we have been talking about, what you have been talking about this morning? Professor Shapiro, would you go first? And then I will ask Professor Dudley.

Mr. SHAPIRO. I was hoping you would ask Susan first. [Laughter.]

I think we agree on several points: first, the need for fairness and accountability; and the need for smart regulation. And I do not deny any of those things.

I think as we developed the regulatory system, it occurred piecemeal. If someone had a good idea about this and someone had a good idea about this, let us add this accountability mechanism, let us add that accountability mechanism. And in and of themselves, none of these are objectionable. The spirit and some of the content of these proposed bills are not objectionable, except that we are adding them on top of every other analytical and procedural requirement that exists.

So it would be good if the Committee wants to go forward, for example, and codify the Executive Orders to also get rid of all the other kinds of duplicative analytical requirements that exist out there. We only need to do a cost-benefit analysis once, but it is required under three or four different statutes. So we have all of these various steps, and I assume Susan would join me by saying we only need to do this once; we need to streamline the process. But, of course, she will speak for herself.

Senator CARPER. All right. Professor Dudley, where do the two of you agree?

Ms. DUDLEY. Let me first agree with that point.

Senator CARPER. OK.

Ms. DUDLEY. But with respect to the duplicative requirements, if they really are duplicative, agencies do not do them twice. They do it once. And so maybe one of the things to do, as you think about it, is how can you make sure that the language does not require a different format for delivering the same analysis, so, for example, the benefit-cost analysis that would be required in the Independent Regulatory Agency Act or the—I forget the numbers, but the smarter regulations. Agencies now do that analysis under Executive Orders, so they do the benefit-cost analysis according to 12866. And then they also have to do it for the Regulatory Flexibility Act, Unfunded Mandates Act. The fact is they tend to do the same analysis. Once you have done that analysis, it supports all these different things.

So I think it is a valid point, and thinking about specific language can help with it, but I do not think it is a real concern that they really are finishing one benefit-cost analysis and then starting a whole new one from scratch, that is not my experience.

The other area where I think we agree is that you talked about a lot of our legislation is really old and that we are trying to shoe-horn regulations that fit new problems into old regulation, I agree—or old legislation. I think that Congress is the accountable body for passing legislation—for writing the laws of the land, and we should not be trying to do things like, for example, the Clean Power Plan based on 1970 sections of the Clean Air Act.

Senator CARPER. Thank you. Thank you very much. Maybe that will get us started in thinking about some other areas where we can agree.

Let us turn to retrospective reviews, if we could. I think this administration has done a particularly good job of trying to make sure that we look at all those old regs that are out there and take a look at them and saying which ones make sense, which ones should be freshened up, gotten rid of, and I know under Cass Sunstein's leadership I think some good work has been done, and my guess is under yours some good work was done, too, Ms. Dudley.

Senator Heitkamp has introduced legislation before this Committee, supported by a number of Members of the Committee, that I think provides a very promising approach to this. And I do have some concerns, though, with the idea of creating a regulatory commission and taking these decisions out of the hands of agencies which actually have a lot of expertise, whether it is toxic substances or air emissions, water emissions, and that sort of thing, and a whole lot of other things, too.

I just want to ask you, do you think a panel of nine people can really have the expertise to review and make binding recommendations on regulations across the government? Susan, why don't you go first.

Ms. DUDLEY. I think the way I have read the bills, they would not be doing it in a vacuum. So they would be working with the

agencies, seeking public comment. There seem to be several opportunities for public comment. So I think it could be constructive.

But I will use the opportunity to say I also think that Senator Heitkamp's bill is really valuable because it does—right now we would be making those decisions without good data. We do not know. Agencies, when we go to look back at regulations, we really do not have the information to evaluate whether the predicted outcomes occurred, and that is what we need to do. We need to start planning for retrospective review with every new rule.

Senator CARPER. OK. And, very briefly, Mr. Shapiro, would you respond?

Mr. SHAPIRO. Senator, I share your concern. The Base Closing Commission, of course, is the model, and it has solved a real problem. But it is focused on one subject, and it can focus on that subject, which is base closing and the military's need to be prepared and have the resources that are necessary to protect us.

As you suggest, the commission sort of has this roving mandate to go all over the government, and I appreciate Professor Dudley's point that it is going to receive input. The bill is very explicit about that. But at the end of the day, you have to make some judgments, and the value of doing this within the context of an agency is those judgments are made with expertise and experience of the staff and often of the administrator. And I do not think that the consulting process really can quite replicate that.

Senator CARPER. All right. Thank you. When we come back—I will telegraph my pitch here for both of you. But when we come back, I am going to ask both of you to look at the issue of the regulatory analyses that are done at independent agencies, and I am going to be asking you is there a way to address those problems without requiring independent agencies to submit their analysis to OIRA. So just be thinking about that. I am going to come back.

Thank you.

Chairman JOHNSON. Senator Lankford.

Senator LANKFORD. Thank you all for being here. I want to be able to follow-up on the same conversation we had about the BRAC-like commission. The concern that I have that I want to be able to talk a little bit about today is the time period. You have nine individuals taking on a lot of regs from across multiple agencies. Their time to be able to get up to speed on it, and then be able to make a good decision, make the proposal, and get it out, is the length of time that is allotted—do you think that is enough time for them to be able to study it, get public input, make a good recommendation, and then send it over to Congress? What kind of time period will that commission need to be able to get good input, do their own research, have conversation with agencies, and get it done?

Ms. DUDLEY. I am not sure what is in the bill, but I think it should probably be 2 years or so.

Senator LANKFORD. I think it is 2 years. I am just trying to figure out if it was a 2-year time period for them to be able to actually work through the process.

Ms. DUDLEY. Yes, so you need at least that much time if you are—I believe so strongly in public comment because I think that there is information that none of us have individually that you

could get from that open comment. So I think there needs to be adequate time for that.

Senator LANKFORD. OK. Mr. Shapiro.

Mr. SHAPIRO. Thank you, Senator. I think that is a realistic concern, and I am not even sure 2 years does it. The fact of the matter is many of these regulatory statutes are just really complex.

Senator LANKFORD. Sure.

Mr. SHAPIRO. There are defensible reasons for that and sometimes not defensible reasons. And so to understand whether or not a particular regulation is doing its job and is appropriate, you have to also understand the statutory scheme. And it is all I can do to teach one subject in law school. I certainly cannot teach four or five with any kind of mastery of environmental law and food protection law and consumer protection law and, of course, add that up across our government.

Senator LANKFORD. Let me follow-up a little bit on this conversation about judicial review as well. Ms. Dudley, you made a comment that you feel like judicial review makes for better regulations because there is accountability built in. I would tell you, when I talk to those that are regulated, they struggle with a place to go when they have a complaint, when they feel like something is truly not working. And, Mr. Shapiro, you talk about this back-door opportunity to be able to go to an agency. They feel like when they take that back door, someone says, "No. We wrote what we wrote," and they have nowhere else to go.

If there is not a regulation that is actually engaging with them to say this really is a problem, where do they go? So the mechanics of that, do you have concerns or comments about this judicial review and then opening that up? For you, Ms. Dudley.

Ms. DUDLEY. I think judicial review, there will be some cases that we all might look at and say, "What were they thinking?" Because judges do not necessarily have the skills to evaluate a regulatory analysis. But I do think the analyses will be better done if agencies know they are going to be subject to review. That is just the way we all work. If they know that there is going to be oversight, it will be done—it will be a better analysis.

Senator LANKFORD. OK. Do you think it gets out of control in a hurry, that it ends up being so many cases that are filed that this quickly gets out of hand?

Ms. DUDLEY. I do not know. We do not see that with the executive branch agencies. Are you asking more—I guess, yes, we see a lot of litigation, and what I think it would do is it would allow people to be litigating on the matters that really are what the trade-offs that they are really thinking about rather than having to litigate on a few words that maybe really were not what everybody is talking about. I am not sure I made that very clear.

Senator LANKFORD. That is OK. Well, the challenge is we want to—I think judicial review is important. I think it is the accountability that you had mentioned before, that does create that accountability out there, and it gives someone to be able to protest to that literally does not work in the cubicle next to the person who made the previous decision. So it gives you some opportunity to get an outside opinion on it, but I think it should be used sparingly. And so trying to be able to build into the language something that

actually works so that you have that opportunity but it is not abused.

Ms. DUDLEY. Well, I am sitting next to an administrative law professor who can correct me if I am wrong, but there already is the Chevron Deference doctrine that would lead the judges to defer to the agencies unless there is something that is egregious.

Senator LANKFORD. Which I would love to be able to discuss at length, because Chevron Deference I think is one of those areas that has grown up and is now out of control in many ways. There is the challenge to find, as we have mentioned already previously, statutes that are 40 years old that we are now interpreting in a way that was never considered by the original statute. There is no new statutes to be able to bring it, and they have deference to be able to expand it. Now you really do have a regulator that looks like they are writing law, but they are just expressing deference for an unconsidered item that is 45 years ago. So the challenge is how do we actually wrap back around that and say we do not need to have Chevron Deference that expands this far for something this old.

Mr. Shapiro, you look like you have a smile on your face. You might have an interest in that.

Mr. SHAPIRO. This is why my students do not like administrative law, Senator. We have this quandary, right? in Chevron, it is not unlimited deference, and various judges disagree—

Senator LANKFORD. It is pretty broad, though.

Mr. SHAPIRO [continuing]. About various approaches. And at some point the courts will say that is just outside the bounds of what Congress intended.

But from the agency's point of view, there is a pressing national problem—climate change. It is their responsibility to try to deal with it, and so they propose, to the extent they can, to address that through existing statutory procedure.

I actually think that the problem for agencies, though, is not so much Chevron, but a very detailed and careful review of the factual and legal basis, particularly the factual basis, for a rule called "hard look review." So we have courts of appeals out there that have very demanding, analytical requirements in order to sign onto a rule and affirm it. The difficulty is that agencies have trouble with coming up with precise evidence on every point. The world is uncertain. Scientific evidence is uncertain. Cost-benefit analysis in particular is uncertain.

And so when we say, for example, that an agency did not quantify a particular benefit, that may be just sloppiness. But it is also very difficult to know how to quantify some of these benefits. So we have to find a way of both using cost-benefit analysis, which can give us useful insights, but not ignoring obvious benefits that we just cannot quite find a way to quantify very accurately or at all.

Senator LANKFORD. Correct. It does seem that we can quantify the costs, but the benefits seem to get out of balance at times. And that is one of the other big challenges, is trying to get the cost-benefit to align on there. If we have 5 years of costs and 20 years or 25 years of benefits, suddenly we are out of balance here, and we are skewing things one way or the other. Or when you take long

look on it, knowing that most of the costs will be early and most of the benefits may be far delayed, again, we are skewing the process on it.

So I would like to continue this—obviously, I am out of time, but I would like to continue this conversation in the days ahead on Chevron Deference. I do think this is a big issue. We have so few laws that are being passed right now and such large effects on things, where an agency feels like they have the responsibility, as you mentioned to address it, but they do not necessarily have the legal authority to address it. Our system demands a new law is passed rather than the agency saying, “It is our job. We will just create this.”

So, with that, I yield back.

Chairman JOHNSON. Senator Enzi.

OPENING STATEMENT OF SENATOR ENZI

Senator ENZI. Thank you, Mr. Chairman. I want to thank the ones who have testified. You have covered quite a few areas and given quite a few suggestions, and I appreciate that.

As an old shoe salesman, I was particularly impressed with Ms. Dudley’s comment about how we are trying to shoehorn new things into old ones, and I see a lot of that happening with our regulations. We are going to back—we found a solution, and now we are looking for a problem to solve. And we go back through the laws and find something that we can wedge it into.

I used to be a mayor during a boom time in Gillette when the energy was beginning to be developed out there, and we have virtually all kinds of energy out there. But I reviewed all the Environmental Impact Statements for every new business that came, and there was supposed to be a comment period for them, and people commented. And the agencies were supposed to comment on the comments. What I found was that it was acceptable for them to say, “No comment necessary,” and dismiss thousands of comments.

We have some problems in what we are doing. This shoehorn situation, one of the things I have been looking at is the rule on mercury and toxins, and sometimes I wonder whether they are designed to solve a problem or if they are intended to put a business out of business.

The mercury and toxins rule was supposed to have a benefit of about \$500 million to \$1 billion. I never was able to determine over what period of time that was. But the cost is \$40 to \$70 billion a year.

Now, there needs to be a solution for that, but did they pick a good solution? Half a billion dollars of benefit, \$40 billion of cost, if you take the lowest estimates of both. Shouldn’t we be looking for solutions instead of just regulations? I think that that is included in some of your two articles that you put out. I appreciate you having done that.

One of the things that this Committee and the Budget Committee combined for a hearing—I think that was the first time in 40 years that the two Committees combined for a hearing. It was on regulations, and one of the people who testified was the equivalent of the Secretary of the Treasury of Canada, who was in charge of their regulations. And he mentioned that they have an inter-

national standard that they use for measuring cost and benefit that aligns both the costs and the benefits in terms of years. Are either of you familiar with that? Could you comment on that a little bit?

Ms. DUDLEY. Yes. As I understand it, it is a standard that looks at the—it would not be able to capture all of types of costs or benefits, but it looks at the number of hours required to do something times—so it is kind of a basic dollar-per-hour amount of time. So it gets at that aspect of regulations, but maybe not opportunity costs or other types of costs.

Senator ENZI. Thank you. What we are talking about, of course, is how do you measure these regulatory costs and how do you measure the benefits and how do you match them up. Do the cost-benefit analysis used by the agencies now, do you feel have standards that ensure that we are measuring anything consistently or accurately? I would ask each of you that.

Mr. SHAPIRO. Yes, Senator, thank you. OMB has fairly detailed guidance, which are sort of the best economic principles, for doing cost-benefit analysis. And agencies do attempt to meet that, given resource constraints. So I think there is a pretty good sort of notion or norm as to how to do these things.

But having said that, and going back to your previous question, these are not easy to do. As Senator Lankford pointed out earlier, for particularly toxic regulation, the costs are up front. Agencies have to add new protections; they have to add engineering equipment. And the benefits we achieve are in the future. It is someone not getting cancer 25 or 30 years down the road.

So the question is: How do you put those on the same baseline? And so we use discounting because a dollar in the future is worth less than a dollar now. But the trick is: What is the discount rate? And so you can get a rule really out of balance by using a very high discount rate, but then those benefits in 25 or 30 years shrink. Of course, the costs are today and tomorrow, and they are very high.

If you use a lower discount rate—and you can do that; there are good economic arguments for doing that—then these things tend to come more in balance. There is really no agreement, as I understand it, which set of discount rates are appropriate. It just depends on how you want to characterize regulation. If you characterize it using investment theory, you tend to use a higher rate. If you use the discount rate of government bonds, which now are very low, you use a very low discount rate.

So it is a kind of policy issue rather than an economic issue. How are we going to treat benefits in the future? And I agree with Senator Lankford, that is a very tricky question.

Senator ENZI. Well, and how do you make sure that the benefits that we are talking about are really related to the same project?

Mr. SHAPIRO. Well—

Senator ENZI. Right no.

Mr. SHAPIRO. I am sorry, Senator.

Senator ENZI. Right now we are having a thing called regional haze that we are trying to correct in the West. Meanwhile, Washington, Oregon, and Idaho are burning up. The smoke is so thick you cannot see anything, and there is actually ash involved in that, which most of the commercial establishments have not been allowed to put ash in the air for about 50 years. But we are regu-

lating the companies, but we are not regulating the problem with the wildfires. So the companies are the ones having to take the blame for the regional haze, when it is not even their problem, their cause.

I do appreciate that we have a Small Business Advisory Committee that is supposed to be looking at any regulation that will cost small business over \$100 million a year in costs, and I would hope that that could be expanded to other businesses as well.

I yield back.

Chairman JOHNSON. Thank you, Senator Enzi. Senator Heitkamp.

Senator HEITKAMP. Thank you, Mr. Chairman.

There is so much here—I mean, we have been pretty wide-ranging, and so I kind of do not know where to start. But I will start by raising another issue that has not been raised here on duplication.

We talk about the frustration of small business or the frustration of American business, and we think about the Federal Government, writ large, and who is doing what and duplication between agencies. But a lot of frustration that I hear is inconsistency and duplication between State and local regulation and Federal regulation, and we have not—I just want to lay down that marker because we have not even begun to talk about addressing those concerns.

You take a look at the Uniform Law Commission. That was created to try and ease commerce across jurisdictions. We have all these various regulatory responsibilities that States have taken on or local municipalities have taken on because they reflect their political ethic, and they are not necessarily lending a path forward for interstate commerce. But that is probably an editorial comment I did not need to make.

Mr. Shapiro, in your testimony, you recommended that the bill that we have introduced for retrospective—I like to call it my “prospective retrospective bill” because it would require any new regulation to actually think about how we are going to review that regulation into the future. And we really thought very hard about flexibility, and we said what better way than make it part of the review process, part of the drafting process, to say this is what we think would be appropriate, we are going to get notice and comment from the industry, from other stakeholders on what would be an appropriate lookback.

And so I was surprised when I read that you thought it was inflexible, because we pretty much thought that what we created, although we did not want to leave this open-ended completely so we put some timeframe on it—10 years is kind of a long time, right? And so I am surprised, quite honestly, and would like further comment that you think that this is not flexible enough and what you would do to make it more flexible in your vision of how we could make that piece of legislation work better.

Mr. SHAPIRO. Thank you, Senator. And I think it is obvious that you were concerned about that and tried to address it. Perhaps the point that is missing in the bill is that when you do these regulatory lookbacks, you have to do them under your statutory mission. And these regulatory requirements in various statutes across the government vary widely. And so I think perhaps what we need

to be careful of is that we are not asking an agency to do a type of review—I agree with you, 10 years is plenty—a type of review that does not fit within their statutory mandate, because they cannot change their statutory mandate. They have to comply with it, and the original regulation, hopefully, was serving that mandate.

Senator HEITKAMP. Yes.

Mr. SHAPIRO. So, for example, it may or may not be possible to develop metrics. It may be that you would have to use quantified or qualitative assessments as to whether it is working.

Senator HEITKAMP. But, again, going back to the option that the agency has, what the bill does is force the agency to think about how will we evaluate this regulation into the future, not what do we need to do to get it done today, but then what does this mean for the future. And one of the regulations that we like talking about—and it was mandated by Congress, and I am going to close out talking about how we have not done our job. But it was mandated by Congress, which was on conflict minerals. We hear about this all the time, about the recordkeeping and the reporting and how do we know where this came from, and, we are subject to huge fines. Even if we do not file a report saying we do not have them, there are huge fines associated with them.

And, when you look at cost-benefits of that kind of regulation and you say have we stopped the development or the production of conflict minerals, have we actually achieved a purpose here, or are we just, kowtowing to an ethic that understandably—and I am not saying that that is not a noble goal, to prevent people from enslaving people to produce minerals. But is this regulation really working to prevent that? And that is really what we are trying, I think very hard, to get at.

If you kind of think about into the future—and I want to talk about Senator King's bill and the kind of commission, because I think this is an idea that is going to bear fruit here. I think we are going to move a bill like this, and I think there is going to be a lot of bipartisan support. So we truly want to get at a bill that is the best it can be in terms of actually achieving a product.

Now, we have been talking about this commission and saying it is nine people, but we consistently turn to OIRA and say, "You are now the expert," right? "You are now the expert on rail safety. You are now the expert on this issue." And so I do not know that we are going to solve some of your concerns today, but we really would like you to kind of at least think about this in the context of this is going to happen, how can we make it better?

A final point that I want to make in the little time that I have left is Congress. We do not do our job. It is a lot easier to pound the table and damn the agency. It is a lot easier to say all the courts got that wrong. And we look at a regulation that is particularly troubling in my State, which is Waters of the United States. That has been back and forth, ping-ponged up to the Supreme Court. The Court has done nothing to provide clarity, right? And so we keep rewriting this. And I would tell you, if you flew over North Dakota and looked down, every bit of that water I think the Environmental Protection Agency (EPA) is asserting jurisdiction over.

Now, beyond the kind of craziness of that result, I would say, How are they going to manage that once they regulate it? And that is another challenge. And I guess I want to kind of close by saying what we need to do here in Congress is start legislating. When we do not agree with what the agency does or even when the agency is struggling with a 40-year-old law, we need to take responsibility. And we do not do that very well here. It is a lot easier to criticize than it is to actually make the decision.

And so I want to give a shout-out to all the Federal workers who are working hard on these regulations. They could use a better partner in the U.S. Congress.

Chairman JOHNSON. Thanks, Senator Heitkamp. Senator Portman.

Senator PORTMAN. Thank you, Mr. Chairman. And I agree with what Senator Heitkamp just said about how Congress has a role here and that, when we get behind on the legislative front is sometimes when you have agencies step in and sometimes overreach, and we certainly have seen that recently with regard to the legislation that she is talking about in terms of Waters of the U.S.

On the independent agencies, again, I want to thank Senator Heitkamp and Senator McCaskill and others for working with us on this. Senator Warner and I have been trying to be accommodating. I think we are close to a final result. But one of the things we have done is put a timeline on OIRA's review of the independent agencies, and let me just be clear on this one for folks who are wondering why this is necessary.

For 30 years, Presidents of both parties have said there should be an economic cost-benefit analysis, and this has been consistent. It is not terribly controversial. What President Obama did, which was the next step, was to say, well, look, these independent agencies—and there are more than a dozen of them—they have more and more power, they are issuing more and more regulations; I am going to issue an Executive Order saying they should also be subject to these rules that the executive branch agencies are subject to.

And what our legislation attempts to do is to codify that in a sensible way, and because Senator Carper just returned, I know he is going to be interested in talking later about, who should do this. I would just say that I agree with Mr. Shapiro on one thing in his testimony, when you said, and I quote, "The White House would not have the same gatekeeping power that it enjoys under those Executive Orders to stop, stall, or change executive branch agencies' rules for political reasons."

That is true, because what you are saying to OIRA in this case is give us an advisory opinion, so you submit the analysis to OIRA and they do an advisory opinion, in essence. So it is not the same as executive branch agencies. Some of us would like to go further, but to accommodate those who are concerned about these issues of timeliness and preserving the independence of those agencies otherwise, we came up with this, what we think is a very reasonable compromise.

So that is where we are. Again, OMB has said that 18 major rules most recently that they analyzed in an entire year, not one was based on a complete quantified cost-benefit analysis. The Ad-

ministrative Conference of the United States has issued similar things. The President's Jobs Council, same thing. OIRA itself has said, ". . . it would be highly desirable to obtain better information on the benefits and costs of the rules issued by independent agencies. The absence of it is a continued obstacle to transparency, and it might also have adverse effects on public policy." So that is what we are trying to do.

On the duplication side of it, there has been discussion of that today, and I just again want to clarify this. It is not requiring a duplication of the cost-benefit analysis, and, Professor Shapiro, in your testimony you said this type of duplication, and I quote, results "in the need to conduct years of analysis before significant rules may be adopted." I do not think that is what is going to happen at all. If the agencies already have the requirement to go through a cost-benefit analysis, it is not duplicated. They submit that to OIRA. That is it. And so if they are required to engage in it, I do not see how it makes it duplicative.

I know, Professor Dudley, you have worked on some of this. Do you have any comments on the duplication concern?

Ms. DUDLEY. That is the same thing that I would say, and my observation is that if agencies have to do an analysis, they are not going to just go and redo a separate analysis or have a separate unit of their agency working on the two analyses. The same analysis will be able to comply with different requirements.

So my only recommendation would be to do things that would make sure that you're not asking—doing things that just require more kind of busy work in order to comply with different statutes. And I did not see that in your bill because I think your bill is—the general requirements of Executive Order 12866 really are very general. They essentially say make sure you do more good than harm; and to the extent you can quantify that, do.

So one little comment—and we have been talking about regulatory impact analysis as if it is benefit-cost analysis, which requires quantification. That is not what any of the Executive Orders require, and in my understanding, it is not what your bills require. Regulatory impact analysis tries to look at the whole and understand that essential point: Are we going to making Americans better off or worse off if we do this?

Senator PORTMAN. All right. I would love both of your comments, if I could, on the financial regulators. One of the pushbacks we have gotten specifically is from financial regulator who say somehow we are so different we should not be subject to cost-benefit analysis. And to me, a lot of these new regs are coming from the so-called financial regulators. They allege this bill would result in delay, the rulemaking, duplicative analysis. Alternatively, they have said that these financial regulations are in a class by themselves, and because they have to issue things quickly in response to market changes, and, they talk about financial stability, that that is their job and, therefore, they should not be subject to this.

I would just ask you all, do you think they are unique from other types of independent agencies in terms of how this bill would affect their rulemaking? Should financial regulators be exempt from, as Professor Shapiro said earlier, fairness, accountability, transparency, and cost-benefit analysis?

Ms. DUDLEY. I know financial regulators have not been doing benefit-cost analysis. They have not been doing the same rigor of regulatory impact analysis. But it is impossible to think that it is harder than trying to measure environmental effects or homeland security effects.

So it is analytically doable because things are already measured in dollars. So it seems to me that it is going to be simpler, if anything.

Senator PORTMAN. Professor.

Mr. SHAPIRO. Thank you, Senator. I do applaud your efforts to thread the needle here and get OIRA's advice without giving them undue influence over the agency as long as Congress wants to keep the agency as independent.

I think where perhaps the commissioners of the various agencies are nervous about this deals with the experience of the SEC so far. The court of appeals has read their statute as requiring that certain kinds of the new financial regulations meet a cost-benefit test in order to be enacted. Now, the statute does not say that.

What Congress often does—and I think this is wise—is it gives an agency a series of things they need to take into account and balance without trying to put all of those on an economic scale or trying to do that in terms of costs and benefits. And so an agency has to speak to each of those.

Now, as to all of those, cost-benefit analysis may be helpful, but the limitation of the methodology is such it really cannot tell us what to do. Yet the court of appeals has very exacting standards for this, and the SEC has sent three different rules up to the court of appeals, and they have knocked down each one, at least in my mind, by fairly picky objections to the failures of the SEC to do the cost-benefit analysis. And so far none of those rules have come back. The agency has not attempted to reissue those rules.

So I think what makes the agencies nervous is finding the happy approach to judicial review, which makes sure the agency does its job, but does not allow it to pick apart the cost-benefit analysis because they are just so difficult to do. And at least in some of the cases, for some of the agencies, they may be even more difficult than environmental regulation.

So, for example, one of the rules dealt with shareholder democracy. It dealt with the rules by which a dissident shareholder could put in an initiative on the annual ballot of the corporation. And the SEC now under this new requirement that the D.C. Circuit has imposed had to figure out the costs and benefits of that. Well, frankly, the cost has always seemed to me fairly minimal. They just need to put it on there. Of course, they do not want to because the board of directors wants to control the ballot.

But when it came to benefits, the problem is: What is the benefit of that? I mean, how do you model that benefit? And they tried. And Susan is an economist. She probably has some better ideas about this than I do. And perhaps they fell short, but I think that is indicative of the difficulty sometimes of measuring these costs and benefits. I am not saying we should not try, but I think that is the difficulty, particularly under strict review.

Sorry to go on for so long.

Senator PORTMAN. My time is way expired now, but just briefly, having that standard approach that is transparent I think actually helps with regard to judicial review rather than having it be left up to courts.

Chairman JOHNSON. Senator Ayotte.

Senator AYOTTE. I want to thank the Chairman, and I want to thank both of you for being here.

Professor Dudley, first of all, what I hear a lot are two things. When I am around New Hampshire and I am meeting sort of businesses of all stripes—small, large—one thing that I hear consistently is whoever is putting together these regulations, they really do not know what it is going to manually take me in my business to actually do what you are asking us to do versus what we are getting for a benefit from it. And I do not know how we bridge that disconnect, but it is very common feedback that I get. Regardless of what the business is doing, regardless of what their political background is, it is a very consistent piece of feedback.

But the other piece of feedback that I get is conflicts. So I recently visited a manufacturer that received conflicting requirements from the Occupational Safety and Health Administration (OSHA) and from the EPA on storage of an adhesive that it used for textiles. In fact, even one agency told the business to do something in a certain way. They did it. And then the next agency came in and was going to fine them for how they did it, for what the other Federal agency told them to do. And so you can imagine they are trying to comply. They just were very frustrated to have this conflict. And I was just surprised at how much they had to actually litigate their case even though they had been told by the other Federal agency, "This is the way you should do it." They had invested resources in doing it and now were going to be fined by another agency.

So how do we provide relief to people so that at least it is clear who is in charge and what they have to do? And who can be the referee? Do you think of having OMB or OIRA serve as an umpire when two agencies issue conflicting requirements? And I think that is the minimum that we owe people in terms of clarity and not having to—especially when you think people are trying to comply and then being told by another agency, "We want you to do it different."

Ms. DUDLEY. And that is really tough because OIRA does try to do that. I mean, that is part of OIRA's job before the rule is issued. But OIRA is not involved at all in enforcement. So when agencies enforce it, you see those conflicts.

It may be that this is something that the retrospective review could catch and improve. Particularly, this may be where the commission would be particularly valuable to get that kind of input.

I think it is a very important problem. I remember hearing a story from a baker once that they wanted to put a fence around their parking lot for their bakery, and they could not do it. Between Homeland Security and OSHA and the other regulations they had to comply with, there was nothing within that that they could actually build this fence.

Can I also respond to your first comment?

Senator AYOTTE. Yes.

Ms. DUDLEY. Because I think that is really important, too. We do not really think through what the unintended consequences of the regulation might be. We do not understand how it will actually—how much time it would take to implement. And that one, I think some of the bills you are looking at, the Advanced Notice of Proposed Rulemaking, maybe get some feedback before we have gone too far down the path of this is the approach that we want to take, and also the retrospective review, doing a better job of looking back I think maybe could address that.

Senator AYOTTE. Professor?

Mr. SHAPIRO. Senator, may I respond in two points?

First, I think that is one of the more useful roles that OIRA plays in the rulemaking process, is putting the rules out to various parts of the government to have them comment, so hopefully they could take in the point of view of other parts of the government, although I agree with her as well that sometimes these things come up in the enforcement provision.

Earlier in my general comments, I spoke about we already have a lot of accountability procedures and process out there, and the Office of Advocacy of the Small Business Administration is particularly charged with the role of representing the particular and unique interests and needs of small business in the rulemaking process, which hopefully would lead them to point out to these agencies at the front end some of these difficulties.

I am not at all sure they do that role as well as they can, and there have certainly been some reports, including by my own organization, suggesting they have a ways to go in doing that. And so one thing that you and perhaps others may want to consider is whether that existing mechanism could be made better by looking at what they do as opposed to adding another one. But I agree with you particularly the coordination problem is very difficult.

Senator AYOTTE. Very challenging. And, in fact, I think just to put in perspective the Small Business Administration's role, I serve on the Small Business Committee as well, and to cite the rule that Senator Heitkamp raised on the Waters of the U.S., the Small Business Administration is supposed to do an analysis of what the impact of regulations are on the small businesses, and that rule was issued before their analysis was actually taken into account.

So I agree. I think that if you want to know, especially on small businesses who—they do not have an army of lawyers and accountants waiting to figure this out. Often, it is just one person or a few people who are working on the business. So I think we need to certainly make it more rigorous, and we need to make it clear for people, and the idea of looking back to this retrospective view, because even if OIRA puts it out in advance, we are not going to know sometimes all of the things that flow from it unless we are actually re-evaluating what happens based on the application of a regulation. So I do hope that is something that we can work together to address.

The other issue is we talked a lot about cost-benefit analysis, and let me just give you an example in New Hampshire, and that is, our fishermen. So we happen to have—National Oceanic and Atmospheric Administration (NOAA) has the catch limits, puts catch limits in place to sustain the fishery, but part of their charge is to

sustain the fishery but also to balance to make sure that they look at the sustainability of the fishing communities and the economic impact. And so just recently in the last 5 years, our commercial fishermen have seen cod catch limits reduced by 95 percent. Can you imagine a business where 95 percent of what you can do goes down? I am not sure how anyone is able to survive that. But now on top of that, NOAA is also requiring that they pay more fees for them to actually monitor themselves.

So we are in this situation where I cannot see how they are taking the balance of the fishery in. And as I look at this idea of cost-benefit analysis, so often it seems that it is skewed one way or the other. And how do we ensure, like in the example of my fishermen and—women, who—we are in New England, iconic New England. We like to keep some fishermen working off our waters. They are going to be out of business. So I am trying to figure out—when the statute says “balance,” often the balance of how it is evaluated does not happen. How do we improve that? Either of you.

Mr. SHAPIRO. Well, as a tourist, I hope we can keep this in place as well.

Senator AYOTTE. I am talking about the small boats.

Mr. SHAPIRO. And as the child of parents who ran a small business, I certainly appreciate—or try to—where you are coming from. And I do not know the particulars of that, but I know in general that on the benefit side, the agency and their scientists try to model the future of the fish population and the extent to which it is depleted, the extent to which they can help it grow faster, and the extent to which they apparently have to put in fairly drastic limits to preserve the sustainability of the particular species. And I do not have any doubt about both the difficulty of doing that, the complexity, and the controversy that probably surrounds how accurate their estimates are. But I think that goes to the difficulty of attaching a monetary value when we use cost-benefit analysis because it depends totally on those scientific projections.

Ms. DUDLEY. I would love to get back to you on that one in particular, because often it is the case that the statute does not allow it. So the agency may do the analysis, but it really does not base its decision on it. So I would like to look into—and I should know this—just what NOAA’s statutory requirements are, if that is all right.

Senator AYOTTE. We would love to have you follow-up on that. I appreciate it.

[The information referred to follows:]

Senator AYOTTE. And, by the way, I think I would argue that our iconic fishermen and—women, they are priceless. [Laughter.]

Chairman JOHNSON. Thank you, Senator Ayotte.

By the way, I wanted to commend you also for the hearing you held up in New Hampshire on heroin. We will probably bring something back here to the Committee on that as well. So we appreciate your leadership on that.

I do want to quickly go through another round. The reason you are seeing such a bipartisan commitment to this regulatory reform is, just as Senator Ayotte pointed out, multiple times a day we hear the anecdotal evidence of businesses coming in, being threatened to be put out of business, or projects being stymied, people being sub-

jected to conflicting regulations from different agencies, and that level of uncertainty is really hampering the ability for our economy to grow so that organizations can grow and produce good-paying jobs. So this is a real problem. That is why you are seeing the kind of bipartisan support.

As an accountant, one thing that drives me nuts working with the Federal Government is you just do not get good information. I agree, these things are very difficult to quantify but you have to use some common sense.

Mr. Shapiro, you talked a little bit about accountability. Again, what I had said is "largely unaccountable," and I can see where you can draw the conclusion I said "unaccountable." But I do want to talk about the unaccountable nature of the fourth branch of government and how they are in many respects getting out of control. And we have not talked yet about a very serious circumvention of our Constitution and really of this body of Congress, and that is the process of sue and settle. This is where, an outside group has got a problem with its environmental regulation, and they work with the regulatory agency that does not necessarily have the legal authority to do something. In a cooperative fashion, they sue the agency. That lawsuit goes to court, and then they settle. And what does the judge do other than say, "OK, well, case dismissed." It becomes law.

Ms. Dudley, would you comment on that? Because there have been multiple circumstances. I had staff just give me a list of the different types of regulations that are now in force from my standpoint—I think people would argue, and maybe it is a legitimate argument—no legal authority, no congressional law passed that gives them the authority, but it is legally binding because the courts have ruled it so. And to me that completely circumvents the constitutional three co-equal branches of government.

Ms. DUDLEY. Well, it even cuts out the President, because it is hard for the President to be aware of an in control of all of those different litigations and settlements.

Chairman JOHNSON. Although the President does control the agencies.

Ms. DUDLEY. Well, he does, but——

Chairman JOHNSON. In theory.

Ms. DUDLEY. So with the regulations, of course, it goes through OIRA, and so there is that oversight. With those settlements it does not go through OIRA the same way, and so you even have less Presidential accountability. I think it is a valid concern.

Chairman JOHNSON. Mr. Shapiro, I would really like your comment, with you being an administrative law professor. What are you seeing there? Does that concern you?

Mr. SHAPIRO. Not as much as you, perhaps, Senator, but that answer probably will not surprise you. Basically, agencies have a choice when they get sued—and, by the way, a lot of these lawsuits are over deadlines that Congress imposed for rulemaking that the agencies find impossible to complete because of resource limitations, and then they get sued, and then they settle that they are actually going to do something.

So the question before the agency is: We got sued. There is some disagreement about the way we interpret this regulation, the way

we implement it, the way we enforce it. Should we go through a whole other round of rulemaking, 10 years, or should we settle this lawsuit? And I think the real objection is by people who also sue the agency, but they do not win. Or the agency forecasts they will not win, but they would have settled it some other way. This is just part of our system.

Chairman JOHNSON. But, again, your answer kind of presupposes this is actually an adversarial lawsuit, some group is an adversary against the agency. And what we are seeing is, no, it is a completely cooperative arrangement where, they say we do not really have the legal authority that we can see, but, we are with you on this one, so why don't you sue us? Again, this is my interpretation of what has happened. Do you deny that that has not happened in the past?

Mr. SHAPIRO. It is a big government, Senator. I cannot deny that lots of things happen in the government. But I do not—

Chairman JOHNSON. But you would have a problem with that, would you not?

Mr. SHAPIRO. I would have to see the specific situation, and that is the difficulty I am having because these things are very contextual. Does the Federal Government ever reach a compromise which is not a good one? Probably. But we would have to look case by case.

Chairman JOHNSON. Ms. Dudley, would you want to cite an example?

Ms. DUDLEY. I am not sure that I can cite an example, but there are law reviews that have been written about that, illustrating that problem where the agency says, "We could not get this through our notice and comment and through our normal rulemaking process. So twist my arm. Come in here and sue me on this, and we will find a way to settle." So I think there is evidence that that happens.

Chairman JOHNSON. Thank you.

Mr. Shapiro, you talked about—and I really did appreciate Senator Carper's question about what do we agree on. And you agreed, and you pointed to this duplication of requirements. And, trust me, this Committee is all about reducing duplication in all of its forms.

Again, what I see is, coming here, everything is additive, which is how you get that duplication. You pass a new law; you pass a new law. So I think part of the purpose of the BRAC Commission—or in our previous hearing, we did talk about a one-in, one-out rule. What would you recommend in terms of a process of subtraction? How would you recommend we eliminate that duplication, not only in terms of requirements on the agencies but in terms of the regulations that have been written, the laws that have been passed that are, again, creating that conflict, the level of uncertainty, hampering organizations, including, for example, the University of Wisconsin at Madison, whose chancellor came in and was looking for some regulatory relief? How can we reduce that duplication? What process would you use if not a BRAC or not a one-in, one-out rule?

Mr. SHAPIRO. The particular duplication to which I was referring, Senator, was not so much the duplication of regulations over here

and over there. I have already stated I think that is a problem, and it is a difficult one.

It is that agencies have all these analytical requirements, and they are different. And it would be good and more efficient if we had these in one place and Congress could decide which ones they want them to do.

So, for example, there are Executive Orders on federalism, litigation analysis—

Chairman JOHNSON. Again, so, yes, we will stipulate there is duplication in both—there are duplication of regulations on the private sector and on organizations, and there is duplication in terms of requirements on the agencies. The question is: How do we eliminate that? What process of subtraction would actually work? Because, again, everything here is a process of addition.

Mr. SHAPIRO. Well, we already engage in retrospective analysis. I am in favor of that. I am just against duplicative retrospective analysis. So, for example, under the Regulatory Flexibility Act, agencies, particularly OSHA and EPA, have to go back under that law—and I forgot the number of years; I think it is 8 or 10—and have to look at the impact on small business every 8 or 10 years.

So my point is if Congress wants to do that another way—and that has been proposed here—then we ought to get rid of that way so they are not having to do it for both, even if they can somehow pass the same analysis off using for the same purpose. So that is what I would—

Chairman JOHNSON. Again, so I am sympathetic with duplication in all its forms. We are trying to figure out a process for elimination.

Ms. Dudley, can you comment on that? And, are there that many examples where regulatory agencies are eliminating regulations themselves?

Ms. DUDLEY. No, there are not. And the retrospective review, I think agencies are not thinking ahead to how they will do retrospective review.

I think there is a difference in duplication in regulations, because if you really do have to report something one way to OSHA and another way to EPA, that really is duplication; whereas, if agencies have to report for the public record what their analysis is for different statutes, that is less duplicative. You have the same analysis and the same process.

Chairman JOHNSON. OK. Senator Carper.

Senator CARPER. Thanks. Thanks, Mr. Chairman.

A couple of our colleagues have talked about how we contribute to the problems by the way we exercise responsibilities in the legislative branch, and sometimes we make situations worse than they otherwise would be. So there is a shared responsibility here. I actually jotted down while others were asking questions some of the ways that we in the Congress can help contribute positively or negatively to this process. It is not that we do not have the ability to have an impact on the regulations. We actually have a lot of opportunities to provide input on the regulations. One of those is by passing legislation that is clear and unambiguous, and it reduces the need for the regulators to come in and kind of put the meat on the bones. If we have robust bones, maybe less meat and less

interpretation is needed. I have seen legislation in which we basically tried to reach a compromise on legislation and actually having the same law or same bill, two different points of view, two directions, and basically say, OK, punt it to the regulators, you guys and gals figure this out, we should not do that.

In the regulatory process, again, we have the opportunity to draft legislative language that is clear and unambiguous. We have the opportunity to pass it, and in the language coming out of a conference report that seeks to reconcile differences between the House and Senate, we can use that opportunity. We have colloquies on the floor, in the Committee, and so forth, which can help address ambiguities. We write report language at the end of the process that says this is what the bill is attempting to do.

When the time comes from the regulators, the writers of the regulations on a particular issue, whether it is environmental or safety or financial services, but we have the opportunity to provide input beyond just the legislation that we have sent to them and to say—write to them, call them, meet with the regulators, and say, “This is what we meant,” or maybe, “We made a mistake here, and this is another thought that we would like to share with you.” We can hold hearings on the draft regulations, and we do that sort of thing here, in another meeting, hearing rooms in the Senate and in the House.

When the regulators actually draft regulations and send them to us, we can comment on those. We can comment on their writing. We can invite folks from the agencies to come over and meet with us, to take our questions and to accept our thoughts, our further thoughts.

When an agency finalizes a regulation, we can actually ask for further delay, or they are about to finalize a regulation, and one example is fiduciary responsibility. The Department of Labor has promulgated draft regulations. We asked them to delay the amount—to extend the period of time where folks can comment by a week or a month or whatever.

And, finally, at the end of the day, if a regulation is drafted and we think it is awful and something else needs to be done, there will be lawsuits filed against them, and we have the opportunity to join in those lawsuits in some cases as a friend of the court. I think that is what you call it. So we actually do have more opportunities to shape the regulations and the regulatory process than maybe we think of, and I just wanted to remind us of that.

I have a question, if I could, both for Professor Dudley and Professor Shapiro, and this goes back to what I said I was going to ask earlier. This is the pitch well telegraphed. But even if we are to assume that there are problems with the quality of regulatory analysis at some of the independent agencies, is there a way to address those problems without requiring the independent agencies to submit their analysis to OIRA? Is there another way to do this that might make more sense? Professor Dudley, why don't you go first.

Ms. DUDLEY. I actually think OIRA review does add a layer of accountability, so I think it is an important element of it. Just asking them to do better analysis, if there is nobody checking their homework, it may not work. Or you will go back to the courts, which, you get inconsistent results.

One thought I have on that, though, is that it could work more like the Paperwork Reduction Act where OIRA reviews independent agencies' requests to collect information, but OIRA's decision—the agency by a vote of the commission can override OIRA's decision. So that might be a way to maybe address that concern.

Senator CARPER. That is a helpful thought. Thank you. Professor Shapiro.

Mr. SHAPIRO. Not to harp on a theme, but I am. There already exists accountability mechanisms. The reason that the independent agencies are different is they are politically balanced to a point. So the party of the President has three; the minority has two. And that puts the minority commissioners in a position to write dissents. The SEC Commissioners, Republican Commissioners, do that all the time, including on the economic analysis. And the SEC has come a long ways, particularly since they have to—they are now required to—and they have gotten a lot better at economic analysis. And I just do not know to what extent OIRA is a useful addition here. I think they do offer good input, and if we are going to do this, I like the way the bill does it, which basically says give us your input and then get out of here, this is an independent commission. And that may be the way to do it, but that is duplicative on top of the two minority commissioners.

Senator CARPER. OK, good. We are going to come back—I will come back to you with some questions in writing, and we will just try to flesh this out just a little bit and see if we cannot find some further consensus.

With respect to codifying Executive Orders, Senators Lankford and Heitkamp, as we have heard, have put forward legislation to codify two key Executive Orders on rulemaking. I think they were issued by former President Clinton, and maybe by President Obama, too. And they lay out the current framework for agencies to follow when issuing regulations. These Executive Orders have, as you heard here, broad bipartisan support.

First, I will ask, Mr. Shapiro, could you help us understand any concerns that maybe you or other observers may have with putting these Executive Orders in statute? You have spoken to this already, but I want you to revisit it. And then I want to come back to you, Professor Dudley, and ask you to restate your views on the value of judicial review. First, Professor Shapiro.

Mr. SHAPIRO. I would say we need to be careful of a couple of things: first, that the requirements do not ask more of the analyses than it is capable of giving, particularly regarding benefits that are difficult to quantify; and, second, to be clear that there's not direct judicial review of the cost-benefit analysis, which would be highly problematic. These things are difficult to do, and if somebody can sue just over the cost-benefit analysis, it would further delay the regulatory system.

That is not to say these things do not get reviewed, but they become part of the rulemaking record, and if and when—and usually when—the agency is eventually sued, a court will take the analysis into account.

The third thing I think it needs to be careful of is, as I indicated earlier, in many of these statutes, Congress anticipated the difficulty of using cost-benefit analysis as the sole guide as opposed

to an input. And so the statutory language says this is how you make a decision. Often there are four or five principles you have to take into account. You have to explain qualitatively how you took those into account and how you balanced the conflicts between all of these legislative principles, and the courts will expect you to do that and do that with some clarity.

So we have to reconcile cost-benefit analysis with statutes that usually do not require it given the difficulty of making that the sole determining feature and make sure that the codification of the cost-benefit analysis, it is just codifying it as an input to that broader process.

Senator CARPER. All right. And, last, Professor, on judicial review, you have mentioned this already before, so just very, very briefly, just touch again on that.

Ms. DUDLEY. I think agencies will take it more seriously, but let me—and this is answering your question, but building on that.

Senator CARPER. Yes.

Ms. DUDLEY. What the Executive Orders say and what the codification of it says, it is talking about regulatory impact analysis, not just benefit-cost analysis, or cost-benefit analysis if you are a lawyer. Economists tend to call it “benefit-cost analysis.” And that is an important point because it is not just—you had earlier said that benefit-cost analysis cannot tell us what to do. I do not think anyone says that it should. It is a tool that provides us the best basis of information from which to make a decision, and that is what the judiciary would be reviewing. It is not did they quantify everything right, but it is did they do that regulatory impact analysis and lay out the pros and cons, the intended consequences, as well as the unintended consequences.

Senator CARPER. Thank you.

Well, Mr. Chairman, this has been a really good hearing, and really a lot of that is a tribute to our colleagues, but especially to our witnesses. I would just say sometimes, we think it is easy to do a benefit analysis or cost analysis. It is hard. On clear air issues, if you are trying to do a cost-benefit analysis, what is the benefit of a parent who does not have to leave work in order to be with a sick child who has an asthma attack? And how do you cost all that out? It is really not easy. And we try hard, we do our best. I guess it is the best we can do.

Thank you for helping us do our jobs better. We are most grateful to you for your input and for your being good citizens.

Thanks, Mr. Chairman.

Chairman JOHNSON. Thank you, Senator Carper.

One thing we do like to do is let the witnesses basically make a final statement, and we will start with Mr. Shapiro. But before we do that, let me just reiterate the reason you are seeing such bipartisan support in that this is a real problem. There have been a number of very successful businesses in Wisconsin, on separate occasions have come up to me, the entrepreneurs, the owners, saying, “Ron, there is no way I could have started my business and grown it to the point I have in today’s regulatory environment. Just no way.” And, again, we all hear these anecdotes all the time. So this is a serious problem.

I will go to you, Mr. Shapiro, but before you do your closing statement, I just have one other quick question, because we talked about accountability. I just would like you to tell me to whom or to what is the Consumer Financial Protection Bureau accountable.

Mr. SHAPIRO. They are accountable to you, sir. Senator Carper was talking about legislative hearings. They are accountable in terms of the entire regulatory process as it exists with the exception of the Executive Orders, which have not been applied to independent agencies. That was a judgment of Congress that it wanted to keep these agencies independent. I think there are some good reasons for that. You have built up an accountability mechanism that takes that into account. They have minority commissioners. They are subject to judicial review. They are subject to many of the same requirements, regulatory flexibility, and other statutes that you have passed—Paperwork Reduction. So I suspect if you work there, it does not sound like or feel like you are not accountable to anyone.

Chairman JOHNSON. OK. Well, anyway, why don't you finish with your final comments. Then we will turn it over to Professor Dudley.

Mr. SHAPIRO. Thank you, Senator, and goodness knows I appreciate the invitation and the questions that have been asked, and I appreciate your struggle to find appropriate administrative procedures that handle the kinds of concerns that all of you have, and about that I say Godspeed, because there is nothing easy about this.

Judge Leventhal, a judge in the 1960's on the D.C. Circuit, once said that in administrative law, complexity has a bright future. And if today's hearing proved anything, I suppose that is the case.

So I would end only by saying that I agree with the ABA, which is a pretty bipartisan, centrist organization, when it said Congress should exercise restraint in the number of rulemaking impact analyses and assess the usefulness of existing and planned analyses. I appreciate the difficulty you are having in doing that, but we have built up a fairly thick level of analytical requirements. That is not to say that we might need new ones, but if we put new ones in place, we ought to take into account the old ones and what we want to do with them.

And then I would end again on the issue of resources. One of the reasons we are having trouble balancing productivity and accountability is the cut in agency budgets. There is just not enough people to do this. If they had more people, they could probably do both better.

Thank you.

Chairman JOHNSON. Thank you. Professor Dudley.

Ms. DUDLEY. Let me too thank you again, both of you and the whole Committee, for these efforts and for taking it so seriously. I think it really does continue. We have seen bipartisan efforts at improving how regulation is done ever since the founding of our country, and I think that you all are continuing that.

I am just going to come back to what regulatory analysis is. What it is intended to be is really an evaluation of effects and trying to understand before we do something, to the best we can, what effect it will have. And then just like you said businesses have to

do, then we do need to come back and see if we were right. So analysis is the hypothesis. We need to be able to gather the data and test that hypothesis, and I think that is something that some of these bills would do.

So I will paraphrase Winston Churchill when he talked about democracy, that regulatory impact analysis is the worst of all things, except for everything else that we have tried. So I think it is something that we need to do.

Chairman JOHNSON. OK. Well, again, I want to thank both the witnesses for the time you have taken, for your thoughtful testimony and your thoughtful answers to our questions.

With that, the hearing record will remain open for 15 days until October 1st at 5 p.m. for the submission of statements and questions for the record. This hearing is adjourned.

[Whereupon, at 12:07 p.m., the Committee was adjourned.]

A P P E N D I X

Opening Statement of Chairman Ron Johnson ***“A Review of Regulatory Reform Proposals”*** **September 16, 2015**

As submitted for the record:

Good morning and welcome.

The stated mission of this committee is to enhance the economic and national security of America. And when I look around this country, I see the layer upon layer upon layer of federal regulations as a threat to America's economic security. Today's hearing is another step in this committee's ongoing work examining the regulatory system and identifying ways to improve it.

Specifically, we will be looking into several legislative proposals – each developed on a bipartisan basis – aimed at sensibly addressing our regulatory problem. These are not aimed at any one regulation or agency. Rather, these are reforms of the rule-making system. These bills acknowledge that the root of the problem isn't any one regulatory agency but a process that often lacks accountability and a connection to real-world impacts.

According to the Congressional Research Service, “the number of final rules published each year is generally in the range of 2,500-4,500,” with the Code of Federal Regulation amounting to more than 100 million words. As such, we will be discussing improvements to the rule-making process that ensure the most costly rules are subject to appropriate scrutiny and public input.

I agreed with President Obama when he said we need to “clear out some of the [regulatory] underbrush. ...That's something that should be non-ideological.” That is why this set of proposals today also includes mechanisms for meaningful look-backs so that rules that are no longer serving a purpose can be removed or modified.

The legislative proposals we are reviewing today are all commonsense steps toward a fairer, more efficient, and economically productive regulatory system. I look forward to discussion with my colleagues on the committee on ways to further improve these proposals as we continue forward in bipartisan way in the legislative process.

Thank you. I look forward to your testimony.

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Statement of Ranking Member Thomas R. Carper
"A Review of Regulatory Reform Proposals"
September 16, 2015

As prepared for delivery:

Good morning everyone. Our thanks to each of you for joining us this morning.

If I could turn briefly from the subject of today's hearing, I would like to note that today is the second anniversary of the tragic shooting at the Navy Yard in Washington, D.C., where 12 lives were lost and several others injured in a senseless act of violence.

On this anniversary, we remember the victims, their loved ones, and all those impacted by this tragedy. We also remember the bravery of all those who came to the aid of others that day. This anniversary is a reminder of the important work we have to do in Congress and across the government to protect federal employees and federal facilities. It's important not to let this moment pass without looking back in remembrance.

One of the most important jobs of Congress is to help create a nurturing environment for job growth. One of the ways we can do that is to have common-sense regulations that provide businesses with predictability they need. When done in a smart way, regulations can help grow our economy.

At the same time, regulations serve a number of other important public purposes. They protect our public health and safety, and the environment.

Though many of us don't think about it on a daily basis, regulations play a role in our daily lives – and usually in positive ways.

Regulations help Americans feel confident that the eggs or oatmeal we had for breakfast this morning won't make us sick and the water we drink is clean. They help make sure the appliances we use in our houses are safe. Every time we get in a car or on a train, like many of us did today on our morning commute, we benefit from regulations that have reduced risk of injury or death.

While there may sometimes be disagreements about certain rules, I believe everyone generally agrees that some regulation is necessary and good.

I like to say that many of the laws Congress enacts can be likened to a skeleton. The agencies then add the meat to the bones when they promulgate regulations.

I hope this hearing today can help highlight the already-extensive and lengthy process that agencies go through to implement regulations. Let me use the Clean Power Plan as an example. Not everyone likes this regulation but it responds to the widely-recognized problem we face on this planet with carbon emissions. The Environmental Protection Agency went to extraordinary lengths over many years to engage in outreach with stakeholders, which resulted in

more than 4.3 million comments on the proposed rule. That resulted in a final rule that is more cost-effective than the originally proposed rule, while also protecting public health and the environment.

I believe whatever we do here in Congress and on this Committee should help reduce burdens and increase transparency while achieving the greatest public benefit. It should be our goal to have the most efficient, effective, and transparent regulatory process we can have. We should ensure that process results in common-sense regulations.

I think the legislative proposals that will be discussed today are well-intentioned. The Senators whose bills we will discuss are all thoughtful legislators. And I am always willing to listen to new ideas.

That having been said, I have some serious concerns about many of the bills we will be discussing today.

I worry that many of these proposals focus too much on the costs of regulations, while ignoring the benefits. Many of the proposals also would add additional hurdles to the regulatory process that would make it even more complicated and lead to significant regulatory delays, rather than help to make the process more efficient.

I do appreciate all of the work that many members of this Committee have put into working on these proposals and I look forward to hearing from them and from our witnesses today.

Regulatory reform in my mind is a lot like working toward a more perfect union. It's hard work and there are tough issues. But we must always keep trying. I look forward to trying to find some consensus today even though there will undoubtedly be some disagreements.

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Sen. Heitkamp Opening StatementSept. 16 HSGAC Hearing: "A Review of Regulatory Reform Proposals"

Thank you Chairman Johnson and Ranking Member Carper for organizing this hearing today to allow us the opportunity to examine very important bills related to regulatory reform. I am very interested in our witnesses' insights on the various bills we will discuss today, and looking forward to a robust discussion on how to improve our regulatory system to ensure we have the most efficient and effective process going forward.

I am especially excited to talk about a group of bills that I developed in concert with my subcommittee Chairman James Lankford. All three are strong bills that work to reduce red tape, make government more transparent and make sure regulations, and the regulatory process, are responsive to our constituents.

I am proud to lead the legislative effort on S. 1817, "The Smarter Regulations through Advance Planning and Review Act." This is a bipartisan and commonsense bill that would require federal agencies to include, as a part of every proposed and final major rule, a framework that will provide a timeframe in which the rule would be reviewed, the data and methodology the agency will use to conduct such reviews, and the method in which the agencies will collect such data.

Retrospective review of regulations is something that most everyone agrees is a good idea and has been part of the regulatory agenda of the past six administrations. Federal agencies have done good work with retrospective review, but more consistency in that effort will mean an improved system.

My thinking behind this bill is to encourage agencies to do the tough thinking early on in the rulemaking process, which will ultimately save the agency and the federal government time and resources. Under current law, agencies and Executive departments are required to conduct a cost-benefit analysis before promulgating a new major rule, and have the results of that analysis reviewed by the Office of Information and Regulatory Affairs.

It makes sense to me that while agencies are collecting data to determine if a rule is necessary, agencies should also prospectively develop a framework to examine whether the rule is meeting its regulatory objectives in the future.

By making retrospective review a part of your ordinary regulatory process, we help ensure that the regulatory system is as effective and efficient as possible. I appreciate the insight today's witnesses will offer about retrospective review and how best we can improve this important effort.

I think we all agree, for our nation to be successful, for our citizens to be able to work hard and provide for their families, for our nation to be safe and secure, we need a responsive regulatory system that produces the highest quality regulations. Retrospective review can help us meet that goal by improving or deleting older regulations which don't meet their objectives anymore.

This is important not just for Executive Agencies, but for Congress as well. We need to make sure agencies look back at their work, so Congress can know that our Executive counterparts are accomplishing their objectives. This effort is part of proper Congressional oversight.

All of this is why I am excited for today's hearing. I look forward to hearing from our witnesses, as well as my colleagues, as we continue to move forward in improving on our regulatory system, and finding common sense solutions to accomplishing our aligned regulatory interest.

THE GEORGE WASHINGTON UNIVERSITY
WASHINGTON, DC

Prepared Statement of Susan E. Dudley

Director, GW Regulatory Studies Center
Distinguished Professor of Practice,
Trachtenberg School of Public Policy and Public Administration

Hearing on

A Review of Regulatory Reform Proposals

Homeland Security and Governmental Affairs Committee

United States Senate

September 16, 2015

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A Review of Regulatory Reform Proposals

Prepared Statement of Susan E. Dudley

September 16, 2015

Thank you Chairman Johnson, Ranking Member Carper, and Members of the Committee for inviting me to share my thoughts as you review regulatory reform proposals. I am Director of the George Washington University Regulatory Studies Center, and Distinguished Professor of Practice in the Trachtenberg School of Public Policy and Public Administration.¹ From April 2007 to January 2009, I oversaw federal executive branch regulations as Administrator of the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB). I have studied regulations and their effects for over three decades, from perspectives in government (as both a career civil servant and political appointee), the academy, and consulting.

I appreciate the Committee's interest in improving how the U.S. government develops and evaluates regulatory policy and am pleased to respond to your invitation to comment on six reform proposals under consideration. Three of the bills focus on evaluating the effects of existing regulations and modifying them as appropriate, and three focus on enhancing analytical procedures conducted before new regulations are issued. These reforms continue a bipartisan tradition in the United States of efforts to make regulation well-informed, transparent, and accountable to the American people. Each of the bills is constructive and if passed, could bring about real improvements in regulatory procedures and outcomes.

Institutionalizing Retrospective Review

S. 708, S. 1683, and S. 1817 would institutionalize retrospective review of regulations. This is important. Agencies seldom look back to evaluate whether existing regulations are achieving their intended effects. While long-standing executive orders require agencies to conduct retrospective review of their rules, these initiatives have had limited success.²

¹ The George Washington University Regulatory Studies Center raises awareness of regulations' effects with the goal of improving regulatory policy through research, education, and outreach. This statement reflects my views, and does not represent an official position of the GW Regulatory Studies Center or the George Washington University.

² Dudley, Testimony before the Homeland Security and Governmental Affairs Committee, United States Senate, "Federal Regulation: A Review of Legislative Proposals, Part II," (July 20, 2011), http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley_HSGAC_20110718.pdf.

S. 708 and S. 1683 would establish an independent body, modeled after the Base Realignment and Closing (BRAC) Commission, to review existing regulations and present recommendations to Congress. S. 1817 would require agencies to plan for retrospective review when they develop new regulations and periodically evaluate them.

S. 708, the “Regulatory Improvement Act of 2015” would establish a Regulatory Improvement Commission responsible for evaluating regulations that have been in effect for at least 10 years and making recommendations for their “modification, consolidation, or repeal.” After opportunities for public input and consultation, the Commission would submit a report to Congress containing proposed legislation to implement recommended regulatory changes. Congress would vote on the full package of recommendations with no amendments. If the bill is enacted, federal agencies would have 180 days to implement the actions specified.

S. 1683, the SCRUB (Searching for and Cutting Regulations that are Unnecessarily Burdensome) Act of 2015 would establish a Retrospective Regulatory Review Commission to review and make recommendations to repeal rules or sets of rules that have been in effect more than 15 years. Congress would vote on a joint resolution approving the Commission’s recommendations in their entirety. The Commission’s report would include estimated costs of the rules targeted for repeal, and its recommendations would divide them into two categories. Agencies would be required to repeal rules in the first category within 60 days of passage of the joint approval resolution. As they issue new regulations, agencies would repeal rules in the second category to offset new regulatory costs.

As Michael Mandel & Diana Carew of the Progressive Policy Institute observe, “the natural accumulation of federal regulations over time imposes an unintended but significant cost to businesses and to economic growth.”³ The BRAC model has potential to address some of the accumulated regulatory burden. First, an independent third-party review of the accumulated stock of regulations would offer an objectivity that past efforts (which depend on regulatory agencies themselves to identify outmoded regulations) lacked. Executive orders requiring agencies to review their regulations “to determine whether [they] should be modified, streamlined, expanded, or repealed so as to make the agency’s regulatory program more effective or less burdensome in achieving the regulatory objectives,”⁴ have met with limited success in

³ Michael Mandel & Diana Carew, *Regulatory Improvement Commission: A Politically-Viable Approach to U.S. Regulatory Reform*, Policy Memo, May 2013 http://www.progressivepolicy.org/wp-content/uploads/2013/05/05.2013-Mandel-Carew_Regulatory-Improvement-Commission_A-Politically-Viable-Approach-to-US-Regulatory-Reform.pdf

⁴ Executive Order 12866 (1993) and Executive Order 13563 (2011). https://www.whitehouse.gov/omb/inforeg_regmatters

part because regulatory agencies have little incentive to find fault with their regulations. Thus, third-party evaluation would likely identify reform opportunities agencies would miss.⁵

Second, requiring Congress to vote up or down on the complete set of recommendations has the potential to overcome the “rent-seeking” behaviors so common with regulation. While most people recognize that the cumulative burden of regulation is likely excessive, the costs of regulation are spread broadly while individual regulations confer advantages on identified parties who thus have incentives to resist reform.⁶

Since the executive branch can only issue regulations pursuant to authority delegated by Congress, the commission’s analysis might provide insights as to whether the underlying statutory authority contributed to any undesirable consequences of the regulations targeted for reform.⁷ As such, in addition to specific regulatory changes, the commission’s review might lead to improvements in underlying legislation.

The “cut-go” element of S. 1683 could impose additional discipline on regulatory agencies. While applying budgeting concepts such as this to regulation faces analytical difficulties, other countries (including Canada and the United Kingdom) have initiated successful programs that require new regulatory costs to be offset by removal of existing regulatory burdens.⁸

While a commission responsible for evaluating 10 to 15 year old regulations would be able to identify unnecessary, redundant, or overly burdensome regulations, it is less likely to provide incentives for ongoing evaluation of regulations or contribute to better designed regulations going forward. Thus, in addition to the one-time commission, a more integrated, continuous practice of retrospective review might serve not only to root out ineffective regulations, but make new regulations more effective.

S. 1817, the Smarter Regulations through Advance Planning and Review Act of 2015, would implement procedures that could serve that role, create an evaluation mindset and a

⁵ “The process of self-evaluation is challenging for all organizations, as it requires complete objectivity. Indeed, history is unkind to organizations that fail to get outside reviews of their work.” Statement of Michael Greenstone, Milton Friedman Professor of Economics, University of Chicago, Director, Energy Policy Institute at Chicago, before the United States Senate Subcommittee on Regulatory Affairs and Federal Management Roundtable on “Examining Practical Solutions to Improve the Federal Regulatory Process.” June 4, 2015

⁶ For a succinct definition of rent seeking, see David Henderson’s entry in the *Concise Encyclopedia of Economics*: <http://www.econlib.org/library/Enc/RentSeeking.html>

⁷ See recommendation 4 of Dudley statement prepared for the United States Senate Subcommittee on Regulatory Affairs and Federal Management Roundtable Discussion “Examining Practical Solutions to Improve the Federal Regulatory Process.” <http://regulatorystudies.columbian.gwu.edu/examining-practical-solutions-improve-federal-regulatory-process> June 4, 2015.

⁸ Dudley, *Can Fiscal Budget concepts Improve Regulation?* July 16, 2015. The George Washington University Regulatory Studies Center Working Paper. <http://regulatorystudies.columbian.gwu.edu/node/350>

feedback mechanism where agencies learn from evaluating regulatory outcomes and improve future rules accordingly. The “Smarter Regs Act” would require agencies to include in proposed major regulations a framework for measuring effectiveness, benefits and costs, as well as plans for gathering the information necessary to do so. Within 10 years of a rule’s promulgation, agencies would assess its benefits and costs, evaluate how well it accomplishes its objective, and determine whether it could be modified to achieve better outcomes.

This would fill an important gap in current regulatory practice. The GW Regulatory Studies Center reviewed all major rules proposed in 2014 and found that, despite requirements to do so, none of them included a plan for retrospective review, and not one was written and designed to facilitate review of its impacts.⁹

S. 1817’s forward-looking approach would complement the commission review envisioned by S. 708 and S. 1683, and ensure that not only are existing regulations being evaluated, but that new regulations are designed to facilitate such evaluation in the future. An advantage of this approach is that it focuses not just on reducing regulatory burdens, but improving regulatory outcomes by subjecting regulatory programs to rigorous evaluation and feedback. Most regulatory analyses rely on models and assumptions to make predictions about the risk reduction benefits that will accrue from a specific intervention. Institutionalizing a requirement to evaluate whether the predicted effects of the regulation were realized would provide a powerful incentive to improve regulatory impact analysis tools used to predict the impacts of regulatory alternatives.¹⁰

Accomplishing the important goals of this bill would require resources. Congress and OMB could reallocate resources from ex ante analysis to allow agencies to gather the information and evaluation tools necessary to validate ex ante predications. Shifting resources from ex ante analysis to ex post review would not only help with evaluation, but would improve our ex ante hypotheses of regulatory effects.

S. 1817 would make OIRA responsible for overseeing compliance with the Act and providing guidance for regulatory assessments. Executive branch oversight of regulatory actions has proven valuable, but it is not sufficient. Congress may also want to assign a congressional body responsibility for reviewing these assessments. Just as the CBO provides independent estimates

⁹ Sofie E. Miller, “Evaluating Retrospective Review of Regulations in 2014” forthcoming from the George Washington University Regulatory Studies Center (2015)
<http://regulatorystudies.columbian.gwu.edu/retrospective-review-comment-project>.

¹⁰ Dudley, “Regulatory Science and Policy: A Case Study of the National Ambient Air Quality Standards,” the George Washington University Regulatory Studies Center Working Paper. September 9, 2015.
<http://regulatorystudies.columbian.gwu.edu/regulatory-science-and-policy-case-study-national-ambient-air-quality-standards>

of the on-budget costs of legislation and federal programs, a Congressional regulatory office could provide Congress and the public independent analysis and serve as an independent check on the analysis and decisions of regulatory agencies and OIRA.¹¹

Improved Analysis for Decision-Making

S. 1818, S. 1820, and S. 1607 aim to improve understanding of possible impacts *before* a regulation is issued. Presidents of both parties for over 30 years have supported ex ante impact analysis of regulations. Despite enjoying bipartisan support, however, these requirements are generally not codified in statute.

S. 1818, the “Principled Rulemaking Act” would codify the language of President Clinton’s Executive Order 12866 and President Obama’s Executive Order 13563.¹² Presidents of both parties have endorsed these requirements and codifying could have several advantages.¹³ First, the legislation would lend congressional support to the Orders’ nonpartisan principles and the philosophy that before issuing regulations agencies should identify a compelling public need, evaluate the likely effects of alternative regulatory approaches, and select the alternative that provides the greatest net benefit to Americans.¹⁴ Many existing authorizing statutes ignore or explicitly prohibit analysis of tradeoffs, leading to regulations with questionable benefits that divert scarce resources from more pressing issues.

Second, legislation could apply these requirements to independent agencies (more on this below). Third, unlike executive orders, compliance with legislative requirements is subject to judicial review,¹⁵ which could be valuable because agencies tend to take more seriously aspects

¹¹ Dudley, “Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future.” *Case Western Reserve Law Review*, Vol. 65 Issue 4, 2015.

<http://law.case.edu/journals/LawReview/Documents/Dudley.pdf>

¹² E.O. 12866, issued in 1993, continued to guide regulatory review during the George W. Bush Administration. E.O. 13563 reaffirmed that Order.

¹³ Dudley, “Improving Regulatory Accountability” <http://law.case.edu/journals/LawReview/Documents/Dudley.pdf>

¹⁴ Section 1(a) of Executive Order 12866 states the regulatory philosophy as follows: “Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.”

¹⁵ Dudley, “Improving Regulatory Accountability” <http://law.case.edu/journals/LawReview/Documents/Dudley.pdf>

of their mission that are subject to litigation. Like executive and congressional oversight, judicial oversight would likely make regulatory agencies more accountable for better decisions based on better analysis.¹⁶

S. 1820, the Early Participation in Regulation Act of 2015, would require agencies to publish an advance notice of proposed rulemaking (ANPR) at least 90 days before publishing a proposed major rule.

Regulatory impact analyses are often developed after decisions are made and used to justify, rather than inform, regulations. ANPRs could be valuable for soliciting input from knowledgeable parties on a range of possible approaches, data, models, etc., before particular policy options have been selected.¹⁷ These might include “back of the envelope” analyses that consider the effects of a wide range of alternatives.¹⁸

S. 1607, the Independent Agency Regulatory Analysis Act explicitly authorizes presidents to require independent regulatory agencies to comply with regulatory analysis requirements. Out of deference to Congress, presidents have exempted some agencies from executive order requirements for regulatory analysis and oversight because of their historical designation as “independent.” As a result, their regulations tend to be less accountable and well-reasoned than others.¹⁹ The Independent Agency Regulatory Analysis Act would require independent regulatory agencies (such as the Securities and Exchange Commission, the Federal Communications Commission, and the Consumer Product Safety Commission) to follow the same principles other agencies have long followed, with a goal of improving regulatory outcomes by understanding possible consequences of new regulations before they are issued.²⁰

¹⁶ Dudley, Testimony before the Joint Economic Committee: Reducing Unnecessary and Costly Red Tape through Smarter Regulations. http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/2013_06_26_Dudley_JEC_statement.pdf (June 26, 2013)

¹⁷ Susan E. Dudley and Kai Wegrich, “Regulatory Policy and Practice in the United States and European Union.” The George Washington University Regulatory Studies Center Working Paper (2015) <http://regulatorystudies.columbian.gwu.edu/achieving-regulatory-policy-objectives-overview-and-comparison-us-and-eu-procedures>.

¹⁸ Christopher Carrigan and Stuart Shapiro, “What’s Wrong with the Back of the Envelope? A Call for Simple (and Timely) Benefit-Cost Analysis,” George Washington University Regulatory Studies Center Working Paper (2014), <http://regulatorystudies.columbian.gwu.edu/whats-wrong-back-envelope-call-simple-and-timely-benefit-cost-analysis>.

¹⁹ Resources for the Future, Can Greater Use of Economic Analysis Improve Regulatory Policy at Independent Regulatory Agencies? <http://www.rff.org/events/pages/can-greater-use-of-economic-analysis-improve-regulatory-policy-at-independent-regulatory-agencies.aspx>

²⁰ Dudley, “Bill would close loophole on figuring regulations’ impacts.” The Conversation. June 19, 2015. <https://theconversation.com/bill-would-close-loophole-on-figuring-regulations-impacts-43504>.

Despite the fact that regulations issued by independent regulatory agencies have broad social impacts, the analysis supporting them tends to be less robust because they have not been covered by the regulatory executive orders. The Administrative Conference of the United States recommended in 2013 that independent regulatory agencies adopt more transparent and rigorous regulatory analyses practices for major rules.²¹ OIRA observed in its most recent regulatory report to Congress that “the independent agencies still continue to struggle in providing monetized estimates of benefits and costs of regulation.” According to available government data, more than 40 percent of the rules developed by independent agencies over the last 10 years provided no information on either the costs or the benefits expected from their implementation.²²

* * *

In closing, let me reiterate my appreciation for the Committee’s interest in regulation, and its consideration of six bipartisan bills that offer constructive approaches to regulatory process reform. In addition to this statement, I respectfully offer for the record two recent writings that may be relevant as you consider these bills. In an article published in the *Case Western Reserve Law Review* on “Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future,”²³ I review previous regulatory reform initiatives and offer recommendations going forward. In a new working paper on “Regulatory Science and Policy: A Case Study of the National Ambient Air Quality Standards,”²⁴ I offer recommendations for improving how science is used in regulatory policy.

²¹ <https://www.acus.gov/research-projects/benefit-cost-analysis-independent-regulatory-agencies>

²² https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/2014-cost-benefit-report.pdf

²³ Vol. 65 Issue 4, 2015. Available at: <http://law.case.edu/journals/LawReview/Documents/Dudley.pdf>

²⁴ The George Washington University Regulatory Studies Center working paper available at: <http://regulatorystudies.columbian.gwu.edu/regulatory-science-and-policy-case-study-national-ambient-air-quality-standards> (September 9, 2015.)

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IMPROVING REGULATORY ACCOUNTABILITY: LESSONS FROM THE PAST AND PROSPECTS FOR THE FUTURE

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Susan E. Dudley[†]

ABSTRACT

This Article examines efforts by the three branches of federal government to oversee regulatory policy and procedures. It begins with a review of efforts over the last century to establish appropriate checks and balances on regulations issued by the executive branch and then evaluates current regulatory reforms that would hold the executive branch, the legislative branch, and the judicial branch more accountable for regulations and their outcomes.

CONTENTS

INTRODUCTION.....	1028
I. EVOLUTION OF EXECUTIVE DISCRETION REGARDING REGULATORY POLICY AND PRACTICE IN THE UNITED STATES.....	1029
A. <i>Early Regulatory Agencies and the Delegation of Legislative Authority</i>	1029
B. <i>Procedural Reform and the Administrative Procedure Act</i>	1031
C. <i>Removal of Economic Regulation</i>	1032
D. <i>Growth in Health, Safety, and Environmental Regulation</i>	1033
E. <i>Executive Controls on Regulation</i>	1034
F. <i>Congressional Efforts at Regulatory Reform</i>	1038
II. EXECUTIVE BRANCH OVERSIGHT OF REGULATION.....	1042
A. <i>President Obama's Initiatives</i>	1042
B. <i>113th Congress Proposals for Executive Branch Controls</i>	1043
1. <i>Enhanced Regulatory Impact Analysis</i>	1044
2. <i>Amendments to the APA</i>	1047
3. <i>Subject Significant Guidance Documents to Regulatory Review and Notice Requirements</i>	1048
4. <i>Incentives to Reexamine Existing Regulations</i>	1049
III. LEGISLATIVE BRANCH OVERSIGHT OF REGULATION.....	1051
A. <i>The REINS Act</i>	1051
B. <i>Create a Congressional Regulatory Oversight Body</i>	1053
IV. JUDICIAL BRANCH OVERSIGHT OF REGULATION.....	1054
A. <i>Changes to the Standard by Which Courts Review Regulations</i>	1054

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B. Judicial Review of Regulatory Impact Analysis.....	1055
C. Judicial Review of Statutory Requirements.....	1056
CONCLUSION.....	1056

INTRODUCTION

In the more than 125 years since Congress created the first regulatory body,¹ the number of regulatory agencies and the scope and reach of the regulations they issue has increased significantly. In 2014, there were more than seventy federal agencies, employing almost 300,000 people to write and implement regulation.² Every year federal agencies issue tens of thousands of new regulations,³ which now occupy more than 175,000 pages of regulatory code.⁴ For over a century, concerns over the accountability of what some have called the “fourth branch of government” have led all three branches of government to take steps to exercise checks and balances on the development and enforcement of regulations.⁵

This Article examines efforts by the three branches of federal government to oversee regulatory policy and procedures. It begins with a review of efforts over the last century to establish appropriate checks and balances on regulations issued by the executive branch and then evaluates current regulatory reforms that would hold the executive branch, the legislative branch, and the judicial branch more accountable for regulations and their outcomes.

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1. The Interstate Commerce Act established the Interstate Commerce Commission in 1887 to regulate railroad rates. Interstate Commerce Act, ch. 104, 24 Stat. 445 (1887).
 2. SUSAN DUDLEY & MELINDA WARREN, ECONOMIC FORMS OF REGULATION ON THE RISE: AN ANALYSIS OF THE U.S. BUDGET FOR FISCAL YEARS 2014 AND 2015, at 2, 7 (2014), available at http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/2015_Regulators_Budget.pdf. Note that “[a]gencies that primarily perform taxation, entitlement, procurement, subsidy, and credit functions are excluded from this report,” so these figures exclude staff developing and administering regulations in the Internal Revenue Service, the Centers for Medicaid and Medicare Services, etc. *Id.* at 14.
 3. OFFICE OF THE FEDERAL REGISTER, FEDERAL REGISTER PAGES PUBLISHED 1936–2013 (2014).
 4. OFFICE OF THE FEDERAL REGISTER, CODE OF FEDERAL REGULATIONS PAGE BREAKDOWN: 1975 THROUGH 2013 (2014).
 5. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253–69 (2001) (outlining nonpresidential mechanisms of controlling agencies and presidential administration of agencies generally).

I. EVOLUTION OF EXECUTIVE DISCRETION REGARDING
REGULATORY POLICY AND PRACTICE IN THE UNITED STATES

We begin with a review of the evolution of regulatory policy in the United States, from the establishment of the first regulatory agencies in the late nineteenth century, to the passage of the Administrative Procedure Act (APA) of 1946,⁶ to the economic deregulation of the 1970s and '80s, to the growth in health, safety, and environmental regulations since then, which has led to increased emphasis on executive branch oversight, congressional reforms, and judicial review.

A. *Early Regulatory Agencies and the
Delegation of Legislative Authority*

Congress established the Interstate Commerce Commission (ICC), the first regulatory agency, in 1887 to regulate railroad rates.⁷ The ICC was an independent, bipartisan commission of seven members, which reached decisions through an adjudicatory approach. Over the next several decades, this model served as the basis for subsequent regulatory commissions, including the Federal Trade Commission (FTC) (1914), the Water Power Commission (1920) (later the Federal Power Commission), and the Federal Radio Commission (1927) (later the Federal Communications Commission (or FCC)); Congress also created other agencies to regulate commercial and financial systems, including the Federal Reserve Board (1913), the Tariff Commission (1916), the Packers and Stockyards Administration (1916), and the Commodities Exchange Authority (1922).⁸ Most of these early agencies were established as independent regulatory commissions outside executive departments⁹ and were structured to be more independent of presidential control.¹⁰ Their members could only be dismissed for good cause ("inefficiency, neglect of duty, or malfeasance in office")¹¹ in contrast to political appointees in executive departments, who serve "at the pleasure of the president"¹² and can be fired for any reason.

6. 5 U.S.C. § 500 (2012).

7. Interstate Commerce Act, ch. 104, 24 Stat. 445 (1887).

8. OFFICE OF MANAGEMENT AND BUDGET, REPORT TO CONGRESS ON THE COSTS AND BENEFITS OF FEDERAL REGULATIONS (1997) [hereinafter OMB 1997].

9. For example, the Packers and Stockyards Administration was established within the Department of Agriculture. Packers and Stockyards Act, 1921, 7 U.S.C. § 181 (2012).

10. Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 615–19 (2010).

11. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 623 (1935).

12. *Myers v. United States*, 272 U.S. 52, 190 (1926) (McReynolds, J., dissenting).

During this period, courts interpreted the separation of powers implicit in Articles I–III of the U.S. Constitution as prohibiting the delegation of legislative powers to the executive. Early cases held that limited delegation was permissible as long as the executive branch was merely “fill[ing] up the details.”¹³ “That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”¹⁴

By 1928, however, the Supreme Court softened its strict interpretation of the nondelegation doctrine in a decision that found that a congressional delegation of power was constitutional because the statute included an “intelligible principle” to guide executive action.¹⁵

In the 1930s, President Franklin Delano Roosevelt’s New Deal brought an increase in the number of government regulatory agencies, including the Food and Drug Administration (FDA) (1931), the Federal Home Loan Bank Board (1932), the Federal Deposit Insurance Corporation (FDIC) (1933), the Commodity Credit Corporation (1933), the Farm Credit Administration (1933), the Securities and Exchange Commission (SEC) (1934), and the National Labor Relations Board (NLRB) (1935).¹⁶ The jurisdiction of other agencies, including the ICC, the FCC, and the FDA, expanded during this period.¹⁷ The Fair Labor Standards Act of 1938¹⁸ created a new agency, now called the Employment Standards Administration, in the Department of Labor (DOL).¹⁹

The sweeping powers of these new regulatory agencies led to concerns over the constitutionality of congressional delegation to a “fourth branch” of government.²⁰ In 1935, the Supreme Court weighed

13. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

14. *Field v. Clark*, 143 U.S. 649, 692 (1892).

15. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

16. OMB 1997, *supra* note 8.

17. *Id.*

18. Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2012)).

19. OMB 1997, *supra* note 8.

20. Angel Manuel Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461, 485–86 (1994) (quoting ROBERT E. CUSHMAN, THE PROBLEM OF THE INDEPENDENT REGULATORY COMMISSIONS, reprinted in, THE PRESIDENT’S COMMITTEE ON ADMINISTRATIVE MANAGEMENT, REPORT OF THE COMMITTEE WITH STUDIES OF ADMINISTRATIVE MANAGEMENT IN THE FEDERAL GOVERNMENT 205–43 (1937)).

in with a ruling that the National Industrial Recovery Act (NIRA)²¹ was unconstitutional because it provided the President (and private industry associations) “virtually unfettered” decision-making power.²²

B. Procedural Reform and the Administrative Procedure Act

Concern that agency “power was not sufficiently safeguarded and sometimes was put to arbitrary and biased use”²³ led both Congress and the Executive Branch to conduct extensive reviews of agency conduct.²⁴ Years of debate culminated in the passage of the Administrative Procedure Act (APA) in 1946.

According to one researcher, the APA reflected a “fierce compromise”:

The battle over the APA helped to resolve the conflict between bureaucratic efficiency and the rule of law, and permitted the continued growth of government regulation. The APA expressed the nation's decision to permit extensive government, but to avoid dictatorship and central planning.²⁵

The APA established procedures an agency must follow to promulgate binding rules and regulations within the area delegated to it by statute. As long as executive branch agencies act within the rulemaking authority delegated to them by Congress, and follow the procedures in the APA, recent courts have not found it unconstitutional for them to write and enforce regulations.²⁶

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21. Pub. L. 73-67, 48 Stat. 195 (1933), *invalidated by* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
 22. A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541–42 (1935).
 23. Wong Yang Sung v. McGrath, 339 U.S. 33, 37 (1950) (citing Elihu Root, *Public Service by the Bar*, 39 ANN. REP. A.B.A. 355, 368 (1916)); Charles E. Hughes, *Some Aspects of the Development of American Law*, 39 PROC. OF THE ANN. MEETING OF THE N.Y.B.A. 266, 269 (1916); George Sutherland, *Private Rights and Government Control*, 40 ANN. REP. A.B.A. 197, 205 (1917); *President Gulhrrie, Judicial Powers by Administrative Boards and the Creation of Administrative Courts*, 46 PROC. OF THE ANN. MEETING OF THE N.Y.B.A. 169, 186 (1923).
 24. *E.g., APA at 65: Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs? Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 25–27 (2011) (statement of Jeffery A. Rosen, Kirkland & Ellis LLP) [hereinafter *Is Reform Needed*].
 25. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559 (1996).
 26. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

While some constitutional scholars still debate the question of delegation,²⁷ recent Supreme Court cases have not overturned legislation or regulation on nondelegation grounds. In 1989, the Supreme Court opined:

In our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.²⁸

Congress has supplemented the APA through legislation tailored to specific programs and passed government-wide procedural laws (e.g., the Freedom of Information Act of 1966,²⁹ and the Government in the Sunshine Act of 1976³⁰).³¹ However, the APA has guided executive branch rulemaking without significant amendment for more than sixty-five years and is one of the most important pieces of legislation ever enacted.³²

C. Removal of Economic Regulation

The regulatory agencies formed during the New Deal and earlier generally issued “economic regulations.” That is, they regulated a broad array of activities within particular industries using economic controls such as price ceilings or floors, quantity restrictions, and service parameters.³³ Economic regulation is often justified by concerns of “market power” or “natural monopoly”—where a market can be served at lowest cost with a single supplier.³⁴

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27. *E.g.*, David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731 (1999); Paul Craig Roberts, *How the Law Was Lost*, 20 CARDOZO L. REV. 853 (1999).
 28. *Mistretta v. United States*, 488 U.S. 361, 372 (1989); *see also* *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 488 (2001) (Stevens, J., concurring in part and concurring in judgment) (arguing that agency rulemaking authority is legislative power).
 29. 5 U.S.C. § 552 (2012).
 30. *Id.* § 552(b).
 31. *See* JEFFREY LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (5th ed. 2012) (discussing generally the creation of programs to supplement the APA).
 32. *Is Reform Needed*, *supra* note 24.
 33. *See* MURRAY L. WEIDENBAUM, BUSINESS AND GOVERNMENT IN THE GLOBAL MARKETPLACE 23–41 (6th ed. 1999) (discussing the development and rationale of U.S. regulation).
 34. *See* W. KIP VISCUSI, JOHN M. VERNON & JOSEPH E. HARRINGTON JR., ECONOMICS OF REGULATION AND ANTITRUST 356–57 (Mass. Inst. Tech. 4th ed. 2005) (1992) (discussing the regulation of natural monopolies).

Though established as independent commissions to avoid political influence,³⁵ observers began to be concerned that these agencies were “captured” by the industries they regulated. By the early 1970s, scholarship in the fields of economics, antitrust, and law generally supported the idea that regulation of private sector prices, entry, and exit tended to keep prices higher than necessary, to the benefit of regulated industries, and at the expense of consumers.³⁶ Policy entrepreneurs in the Ford, Carter, and Reagan Administrations, in Congress, and at think tanks were able to link this knowledge to the problem of inflation by showing that eliminating economic regulations and fostering competition would lead to reduced prices.³⁷ Bipartisan efforts across all three branches of government eventually led to the abolition of whole agencies such as the Civil Aeronautics Board and the ICC, and removal of unnecessary regulation in several previously regulated industries, with resulting improvements in innovation and consumer welfare.³⁸

The transportation and telecommunications deregulation that took place in the 1970s and 1980s is generally regarded as a success, having lowered consumer prices and increased choices. Deregulation and consumer choice have aligned service quality with customer preferences. Competitive markets have generated real gains—and not just reallocated benefits—for consumers and society as a whole, and markets have evolved in beneficial ways that were not anticipated before deregulation.³⁹

D. Growth in Health, Safety, and Environmental Regulation

At the same time that economic forms of regulation were declining, a new type of regulation began to emerge, aimed at protecting consumers, environmental quality, and workplace safety. Many of these new regulatory agencies were established as part of the executive branch, either in departments, such as the newly formed Department

35. See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625 (1935) (noting that Congress created the Federal Trade Commission as an independent agency because “it was essential that the commission should not be open to the suspicion of partisan direction”).

36. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971).

37. Susan E. Dudley, *Alfred Kahn 1917–2010*, REGULATION, Spring 2011, at 8.

38. MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 5 (1985); ICC Termination Act of 1995, Pub. L. No. 104-88, § 101, 109 Stat. 803, 804 (1995).

39. Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. ECON. PERSP., 89, 89–90, 97 (1998).

of Transportation (DOT) (1967),⁴⁰ or as standalone agencies, such as the Environmental Protection Agency (EPA) (1970).⁴¹ Unlike the economic regulatory agencies created earlier, these new agencies had the power to regulate across industry boundaries and affect industrial processes, product designs, and by-products.⁴²

Safety regulatory agencies established within the DOT included the Federal Highway Administration (established in 1966 to set highway and truck safety standards), the Federal Railroad Administration (established in 1966 to issue rail safety standards), and the National Highway Traffic Safety Administration (established in 1970 to set passenger vehicle standards).⁴³

Congress expanded the newly created EPA's authorities through the Clean Air Act (1970), the Clean Water Act (1972), the Safe Drinking Water Act (1974), the Toxic Substances Control Act (1976), and the Resource Conservation and Recovery Act (1976).⁴⁴

Congress also created the Occupational Safety and Health Administration (1970) as part of DOL and expanded mine safety and health regulation.⁴⁵ Other labor-related regulations were authorized through the Pension Benefit Guaranty Corporation and the Pension and Welfare Administration, "established in 1974 to administer and regulate pension plan insurance systems."⁴⁶ During the same period, Congress established several independent regulatory agencies, including the National Credit Union Administration (1970), the Consumer Product Safety Commission (1972), the Nuclear Regulatory Commission (1973), and the Federal Energy Regulatory Commission (1977).⁴⁷

E. Executive Controls on Regulation

Concerns over the burden of these new regulations and other reporting requirements led President Carter (building on efforts of Presidents Nixon and Ford before him) to create procedures for analyzing

40. Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (codified at 49 U.S.C. § 102 (2012)).

41. David M. Bearden et al., Cong. Research Serv., RL 30798, Environmental Laws: Summaries of Major Statutes Administered by the Environmental Protection Agency 1 (2013).

42. See WEIDENBAUM, *supra* note 33 (comparing the "old method" of regulations, which were more industry specific, with the "new method" of regulations, where agencies have broader jurisdiction).

43. OMB 1997, *supra* note 8.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

the impact of new regulations and minimizing their burdens.⁴⁸ They also led to the passage of two significant pieces of legislation in 1980. The Regulatory Flexibility Act (RFA)⁴⁹ required agencies to analyze the impact of their regulatory actions on small entities and consider effective alternatives that minimize small entity impacts. The Paperwork Reduction Act (PRA) of 1980⁵⁰ established the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) to review and approve all new reporting requirements with an eye toward minimizing burdens associated with the government's collection of information.

When President Reagan took office in 1981, he continued to pare back economic regulations, and through Executive Order 12,291,⁵¹ he gave the newly created OIRA a role in reviewing draft regulations to ensure their benefits exceeded their costs. Executive Order 12,498,⁵² issued in 1985, established a Regulatory Program of the most significant upcoming regulations, published annually to "improve the management of regulatory activity within the Executive branch" and "provide the public and the Congress with a greater opportunity to learn about and evaluate . . . regulatory priorities and procedures."⁵³ Each subsequent president has continued and expanded OIRA's central regulatory oversight role,⁵⁴ if not its budget.⁵⁵

President George H.W. Bush continued to operate under President Reagan's executive orders, and when President Clinton took office in 1993, he replaced them with E.O. 12,866,⁵⁶ which remains in effect today. E.O. 12,866 retained OIRA's review of significant new

48. President Carter's E.O. 12,044 required agency heads to determine the need for a regulation, evaluate the direct and indirect effects of alternatives, and choose the least burdensome. Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

49. Pub. L. No. 96-354, 94 Stat. 1164 (1980) [hereinafter *Regulatory Flexibility Act*].

50. Pub. L. No. 96-511, 94 Stat. 2812 (1980).

51. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).

52. Exec. Order No. 12,498, 3 C.F.R. 323 (1986).

53. Message to the Congress on the Regulatory Program of the United States Government, 2 PUB. PAPERS 1066 (Aug. 7, 1986).

54. Susan E. Dudley, *Observations on OIRA's Thirtieth Anniversary*, 63 ADMIN. L. REV. 113, 114-15, 127 (2011).

55. See Kathryn Vesey, *OIRA Celebrates 30th Anniversary*, THE GEORGE WASH. UNIV. REG. STUDIES CTR. (June 28, 2011), https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/20110628_oira_staffing.pdf (describing the budgetary and staffing constraints of OIRA).

56. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

regulations⁵⁷ and reinforced the philosophy that regulations should be based on an analysis of the costs and benefits of all available alternatives and that agencies should select regulatory approaches that maximize net benefits to society unless otherwise constrained by law.⁵⁸ President George W. Bush and President Obama have continued these policies and procedures. President Obama's recent reforms are discussed in the next section. In addition, over the last three decades, OIRA has issued several bulletins and memoranda elaborating on these executive orders, including OMB Circular A-4 providing agency guidance on preparing regulatory impact analysis,⁵⁹ bulletins articulating good practices for guidance documents,⁶⁰ data quality,⁶¹ and peer review,⁶² principles for risk analysis,⁶³ and others.⁶⁴ The table below lists the executive orders that have guided regulatory development and presidential oversight since 1978.

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57. Executive Order 12,866 limited OIRA review to "significant" regulations but provides the OIRA with some room to determine what falls into that definition. *Id.* at 644–48.
 58. *See id.* at 638–39 (stating the regulatory philosophy and principles that federal agencies should keep in mind when promulgating regulations).
 59. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-4, REGULATORY ANALYSIS (2003).
 60. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3440 (Jan. 25, 2007).
 61. Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002).
 62. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMO NO. M-05-03, ISSUANCE OF OMB'S "FINAL INFORMATION QUALITY BULLETIN FOR PEER REVIEW" (2004).
 63. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB MEMO NO. M-07-24, UPDATED PRINCIPLES FOR RISK ANALYSIS (2007).
 64. OIRA's website provides links to guidance for regulatory departments and agencies when developing and reviewing regulations. *OIRA-For Agencies*, OFFICE OF MGMT. & BUDGET, http://www.whitehouse.gov/omb/info/regpol_agency_review/ (last visited Feb. 1, 2015).

Executive Orders on Regulatory Analysis and Oversight⁶⁵

Executive Order	Title	Administration	Date Signed
EO 12,044 ⁶⁶	"Improving Government Regulations" (revoked by EO 12,291)	Carter	March 23, 1978
EO 12,174 ⁶⁷	"Paperwork" (revoked by EO 12,291)	Carter	November 30, 1979
EO 12,291 ⁶⁸	"Federal Regulation" (revoked by EO 12,866)	Reagan	February 17, 1981
EO 12,498 ⁶⁹	"Regulatory Planning Process" (revoked by EO 12,866)	Reagan	January 4, 1985
EO 12,866 ⁷⁰	"Regulatory Planning and Review" (amended by EO 13,258)	Clinton	September 30, 1993
EO 13,258 ⁷¹	"Amending Executive Order 12866 on Regulatory Planning and Review" (revoked by EO 13,497)	G.W. Bush	February 26, 2002
EO 13,422 ⁷²	"Further Amendment to Executive Order 12866 on Regulatory Planning and Review" (revoked by EO 13,497)	G.W. Bush	January 18, 2007
EO 13,497 ⁷³	"Revocation of Certain Executive Orders Concerning Regulatory Planning and Review"	Obama	January 30, 2009

65. *Regulation 101*, GEORGE WASH. UNIV. REG. STUDIES CTR., <http://regulatorystudies.columbian.gwu.edu/regulation-101#ExecutiveOrders> (last visited Apr. 11, 2015).

66. Exec. Order No. 12,044, 3 C.F.R. 152 (1979).

67. Exec. Order No. 12,174, 3 C.F.R. 462 (1980).

68. Exec. Order No. 12,291, 3 C.F.R. 127(1982).

69. Exec. Order No. 12,498, 3 C.F.R. 323 (1986).

70. Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

71. Exec. Order No. 13,258, 3 C.F.R. 204 (2003).

72. Exec. Order No. 13,422, 3 C.F.R. 191 (2008).

73. Exec. Order No. 13,497, 3 C.F.R. 218 (2010).

EO 13,563 ⁷⁴	"Improving Regulation and Regulatory Review"	Obama	January 18, 2011
EO 13,579 ⁷⁵	"Regulation and Independent Regulatory Agencies"	Obama	July 11, 2011
EO 13,610 ⁷⁶	"Identifying and Reducing Regulatory Burdens"	Obama	May 10, 2012

While these executive branch efforts have done little to slow the growth in new regulation,⁷⁷ they have focused attention on understanding the effects of regulations, and some argue they have resulted in "smarter regulation" that produces more benefits than costs.⁷⁸

F. Congressional Efforts at Regulatory Reform

Political scientists agree that Congress has "an 'awesome arsenal' of weapons"⁷⁹ to control agencies' actions, including "legislation, appropriations, hearings, investigations, personal interventions, and 'friendly advice' that is ignored at an executive's peril."⁸⁰ James Q. Wilson used an analogy to explain the two main ways Congress exercises control over federal agencies. One is through authorizing legislation, which he characterized as "architectural; the life of an agency is constrained by its need to live within a certain space, move along prescribed corridors, and operate specified appliances."⁸¹ The

74. Exec. Order No. 13,563, 3 C.F.R. 215 (2012).

75. Exec. Order No. 13,579, 3 C.F.R. 256 (2012).

76. Exec. Order No. 13,610, 3 C.F.R. 258 (2013).

77. The GW Regulatory Studies Center maintains various statistics on regulatory activity, including pages of regulatory code, on-budget costs and personnel at regulatory agencies, numbers of regulations, etc. *Reg Stats*, GEORGE WASH. UNIV. REG. STUDIES CTR., <http://regulatorystudies.columbian.gwu.edu/reg-stats> (last visited Feb. 1, 2015).

78. See, e.g., John D. Graham, Paul R. Noe & Elizabeth L. Branch, *Managing the Regulatory State: The Experience of the Bush Administration*, 33 FORDHAM URB. L.J. 953 (2006) (explaining how President George W. Bush's administration used a "smart regulation" approach that evaluated regulations using multiple disciplines); Cass Sunstein, *Smarter Regulation: Remarks from Cass Sunstein, Administrator, Office of Information and Regulatory Affairs*, 63 ADMIN. L. REV. 7 (2011) (describing President Obama's approach to federal regulation and the purpose of the regulatory system).

79. JAMES Q. WILSON, BUREAUCRACY 236 (1989) (citing Herbert Kaufman, THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS 164 (1981)).

80. *Id.*

81. *Id.*

other is like “fire fighting; when an alarm goes off signaling that an agency may be violating some congressional interest, members of Congress rush in to put out the fire.”⁸² Until the Supreme Court struck the legislative veto down in 1983,⁸³ Congress used its architectural powers to insert legislative veto provisions in more than two hundred statutes, allowing one or both houses or their relevant committees to disapprove, without the President’s signature, an agency’s exercise of delegated authority.⁸⁴

Despite these powers, the legislative branch has been less active than the executive branch in exerting concerted oversight over the regulatory process.⁸⁵ In 1995, a Republican majority took control of both houses of Congress, having run on a platform that included regulatory reform. By this time, the social regulations (addressing health, safety, and environmental issues) that had begun in the 1970s were the focus of concern. In contrast to the consensus on economic regulations, academics and policy makers did not generally support outright deregulation, but rather reforms to make regulations less burdensome and more cost-beneficial.

The 104th Congress announced an ambitious agenda that included efforts to codify regulatory impact analysis procedures similar to those required through executive order, to require compensation for regulatory actions that reduced the value of property rights, to cap the costs of new regulations through a regulatory budget, and to give Congress more control and accountability over the content of new regulations.⁸⁶

These efforts at comprehensive regulatory reform legislation in the 104th Congress failed to win a majority of votes, but some targeted efforts became law, including these:

- The Unfunded Mandates Reform Act (UMRA) of 1995,⁸⁷ which required executive branch agencies to estimate and try to minimize burdens on state, local, and tribal governments, and private entities,

82. *Id.*

83. *See INS v. Chadha*, 462 U.S. 919 (1983) (holding that the congressional veto provision in Immigration and Nationality Act is unconstitutional).

84. Wilson, *supra* note 79, at 243.

85. Kagan, *supra* note 5, at 2257 (noting that Congress used its veto powers rarely).

86. Susan E. Dudley, *Administrative Law & Regulation: Prospects for Regulatory Reform in 2011*, 12 ENGAGE 7, 7 (2011).

87. Pub. L. No. 104-4, 109 Stat. 48 (1995).

- The Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996,⁸⁸ which reinforced RFA requirements for small business impact analyses and provided for judicial review of agencies' determinations as to whether regulations would have "a significant economic impact on a substantial number of small entities,"⁸⁹
- The Congressional Review Act (CRA) of 1996,⁹⁰ contained in SBREFA and passed in response to the loss of the legislative veto, which required agencies to submit final regulations with supporting documentation to both houses of Congress, and established expedited procedures by which Congress could overturn regulations within a specified time using a Joint Resolution of Disapproval,
- 1995 Amendments to the Paperwork Reduction Act,⁹¹ which reauthorized OIRA and required further reductions in paperwork burdens, and
- Title VI, Section 645, of the Omnibus Consolidated Appropriations Act of 1997,⁹² which directed OMB to submit a report to Congress estimating the costs and benefits of major regulations, and offer recommendations for reform. The Consolidated Appropriations Act of 2001⁹³ made permanent this requirement for OMB to report to Congress annually.⁹⁴

These efforts have had mixed results. Agencies generally meet UMRA requirements with reference to regulatory impact analyses prepared pursuant to Executive Order 12,866 but rarely do more.⁹⁵

88. Pub. L. No. 104-121, 110 Stat. 857 (1996).

89. *Id.* at 865-66.

90. *Id.* at 868-69.

91. Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (1995).

92. Pub. L. No. 104-208, 110 Stat. 3009, 3009-366 (1996).

93. Pub. L. No. 106-554, 114 Stat. 2763 (2000).

94. *Id.* at 2763A-161. The 104th Congress also passed amendments to the Safe Drinking Water Act, directing the Environmental Protection Agency to set standards based on a balancing of costs and benefits. Safe Drinking Water Act Amendments of 1996, Pub. L. No. 104-182, 110 Stat. 1613 (1996).

95. See *Unfunded Mandates and Regulatory Overreach: Hearing Before the Subcomm. on Tech., Info. Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. 11 (2011) (statement of Susan E. Dudley, George Washington Univ. Reg. Studies Ctr.) [hereinafter Dudley, *Unfunded*].

While pursuant to SBREFA, courts have overturned regulations that fail to consider impacts on small business,⁹⁶ agencies have successfully defended regulations that ignore the RFA requirements if the regulation's effects on small entities are considered to be "indirect."⁹⁷

"Congress has used the CRA to enact a resolution of disapproval only once, overturning an OSHA regulation addressing ergonomics in the workplace."⁹⁸ Though resolutions of disapproval require only a simple majority in Congress (and several have passed one house), they face the threat of presidential veto, which would require a two-thirds majority to override. The conditions surrounding the ergonomics regulation were likely key to its disapproval. It was a "midnight regulation," issued amid much controversy at the end of the Clinton Administration. The resolution disapproving the rule came at the beginning of the Bush Administration (which did not support the rule), eliminating the veto threat. Although it has only nullified one action using the CRA, Congress has introduced dozens of resolutions of disapproval,⁹⁹ and in some instances, the threat of passage of a resolution of disapproval may have compelled agencies to modify regulatory actions.¹⁰⁰

Mandates) (discussing the shortcomings of UMRA for its limited coverage of regulations and inadequate requirement for agency analysis).

96. See *Nw. Mining Ass'n v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998) (recognizing private business' rights to be informed when their interests are at stake by government regulations and to participate in the regulatory process); *S. Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411 (M.D. Fla. 1998) (striking down a fishery management plan for failing to consider economic effects on small businesses required by RFA).
97. *American Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1043–45 (D.C. Cir. 1999); see also Jeffrey J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act: An Early Examination of When and Where Judges Are Using Their Newly Granted Power over Federal Regulatory Agencies*, 41 WM. & MARY L. REV. 1425, 1449 (2000) (discussing cases where the regulations were upheld by courts).
98. *APA at 65: Is Reform Needed to Create Jobs, Promote Economic Growth, and Reduce Costs; Hearing Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 14 (2011) (statement of Susan E. Dudley, George Wash. Univ. Reg. Studies Ctr.); see also RICHARD S. BETH, CONG. RESEARCH SERV., RL31160, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT 9 (2001) (giving the details on both the Senate's and the House's disapproval of the rule submitted by OSHA).
99. *Congressional Review Act FAQs*, U.S. GOV'T ACCOUNTABILITY OFFICE, http://www.gao.gov/legal/congressact/cra_faq.html (last visited Feb. 7, 2015).
100. Steven J. Balla, *Legislative Organization and Congressional Review of Agency Regulations*, 16 J.L. ECON. & ORG. 424, 429 (2000).

Pursuant to the Regulatory Right to Know Act,¹⁰¹ OMB does report annually to Congress on the costs and benefits of major regulations,¹⁰² but a 2001 Congressional Research Service report observed that OMB's reports "have been incomplete, and its benefits estimates have been questioned."¹⁰³ The General Accounting Office¹⁰⁴ and others¹⁰⁵ have noted that it is difficult for OMB to report objectively on estimates of regulatory benefits and costs.

II. EXECUTIVE BRANCH OVERSIGHT OF REGULATION

A. President Obama's Initiatives

Like presidents before him, President Obama has reinforced and expanded the principles and practices of regulatory analysis and executive oversight. He retained OIRA, and its staff of fewer than fifty career civil servants who operate within the Executive Office of the President, reviewing regulations to ensure they are consistent with the President's priorities, and coordinating interagency review to avoid redundancy and conflict.¹⁰⁶ With its mission to ensure that regulations' benefits justify their costs, OIRA plays an important role. It is institutionally more interested in impacts on society broadly and less susceptible to special interest pressures than line agencies,¹⁰⁷ and provides what President Obama has called "a dispassionate and analytical 'second opinion' on agency actions."¹⁰⁸

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101. Pub. L. No. 106-554, § 624, 114 Stat. 2763A-161 (2000). 31 U.S.C. § 1105, Annual Statement and Report on Rules and Regulations (2012).
 102. OFFICE OF MGMT. & BUDGET, *OIRA Reports to Congress*, THE WHITE HOUSE, http://www.whitehouse.gov/omb/inforeg_regpol_reports_congress/ (last visited Feb. 7, 2015).
 103. ROGELIO GARCIA, CONG. RESEARCH SERV., IB95035, FEDERAL REGULATORY REFORM: AN OVERVIEW 11 (2001).
 104. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-99-59, REGULATORY ACCOUNTING: ANALYSIS OF OMB'S REPORTS ON THE COSTS AND BENEFITS OF FEDERAL REGULATION 56 (1999) [hereinafter GAO, ANALYSIS OF OMB'S REPORTS].
 105. Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation*, 47 BUS. ECON. 165, 175 (2012).
 106. OFF. OF MGMT. & BUDGET, *About OIRA*, THE WHITE HOUSE, http://www.whitehouse.gov/omb/inforeg_administrator (last visited Feb. 7, 2015).
 107. Susan E. Dudley, *Regulatory Reform: Lessons Learned, Challenges Ahead*, REGULATION, Summer 2009, at 6.
 108. Memorandum on Regulatory Review, 74 Fed. Reg. 5977 (Feb. 3, 2009).

On January 18, 2011, the President published an op-ed in the *Wall Street Journal*¹⁰⁹ outlining his approach to regulation and issued a new executive order. Executive Order 13,563 on “Improving Regulation and Regulatory Review” reaffirmed the principles and practices that have been in effect since 1981.¹¹⁰ It reinforced President Clinton’s Executive Order 12,866 and stressed the importance of conducting sound analysis of likely regulatory impacts, of providing public opportunities to engage in the process of developing new regulations, and of designing less burdensome, more flexible approaches to achieve regulatory goals. It also required agencies to develop plans for periodically reviewing regulations already on the books, with an eye toward streamlining, repealing, or expanding them to make them more effective and less burdensome.

President Obama ventured further than previous presidents in issuing E.O. 13,579 in July 2011, encouraging independent regulatory agencies to comply with E.O. 13,563 requirements “concerning public participation, integration and innovation, flexible approaches, and science,” to the extent permitted by law.¹¹¹ E.O. 13,579 also said that these “agencies should consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned,” and make such information public.¹¹²

E.O. 13,610, issued in May 2012, focused on “Identifying and Reducing Regulatory Burdens.”¹¹³ It directed agencies to engage the public in their retrospective review of existing regulations, prioritize reviews that would produce significant quantifiable savings, and report regularly to OIRA on the progress of their initiatives.¹¹⁴

B. 113th Congress Proposals for Executive Branch Controls

The 113th Congress considered various regulatory reform proposals designed to give the executive branch more responsibility for ensuring

109. Barack Obama, Op-Ed., *Toward a 21st-Century Regulatory System*, WALL ST. J., Jan. 18, 2011, at A17.

110. Press Release, Office of the Press Sec’y, Fact Sheet: The President’s Regulatory Strategy, (Jan. 18, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/01/18/fact-sheet-presidents-regulatory-strategy>.

111. Exec. Order No. 13,579, 3 C.F.R. 256 (2012).

112. *Id.* at 257.

113. Exec. Order No. 13,610, 3 C.F.R. 258 (2013).

114. *Id.* at 259.

new regulations meet procedural and analytical requirements.¹¹⁵ None of these were enacted into law, but the concepts behind them may serve as the foundation for future initiatives.

1. Enhanced Regulatory Impact Analysis

Several bills focused on codifying requirements for regulatory impact analysis of proposed regulations.¹¹⁶ As discussed above, presidents of both parties over the last thirty years have issued executive orders articulating nearly identical regulatory analysis principles to guide regulatory decisions, and at least since 1980, there have been attempts to codify these executive requirements in statute.¹¹⁷

Though the creation of a statutory obligation for meeting these regulatory impact analysis standards is probably not necessary to ensure that future presidents continue to endorse them, codifying the requirements could have several advantages. First, such legislation would lend congressional support to the nonpartisan principles and the philosophy that before issuing regulations agencies should identify a compelling public need, evaluate the likely effects of alternative regulatory approaches, and select the alternative that provides the greatest net benefit to Americans.¹¹⁸ The Sound Regulation Act,¹¹⁹ and

115. See REG. STUDIES CTR., *Regulatory Reform Bills, 113th Congress*, GEORGE WASH. U., <http://regulatorystudies.columbian.gwu.edu/regulatory-reform-bills-113th-congress> (last visited Feb. 8, 2015).

116. See, e.g., Restoring Honesty for Our Economy Act, S. 786, 113th Cong. (2013) (requiring “agencies to quantify costs associated with proposed economically significant regulations”); Sound Regulation Act of 2014, S. 2099, 113th Cong. (2014) (placing more emphasis on the benefit-cost analysis developed to support regulations).

117. 1980 ECONOMIC REPORT OF THE PRESIDENT 125 (1980) [hereinafter 1980 ECONOMIC REPORT].

118. Exec. Order No. 12,866, 3 C.F.R. 638 (1994) (“Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach.”).

119. H.R. 3863, 113th Cong. (2014).

the Jumpstarting Opportunities with Bold Solutions Act¹²⁰ would have required federal agencies to identify “the nature and significance of the market failure, regulatory failure, or other problem that necessitates regulatory action and why other alternatives, such as market forces or state or local regulations, could not address the problem better than federal regulation,”¹²¹ and “develop at least 3 distinct regulatory options, in addition to not regulating, that the agency estimates will provide the greatest benefits for the least cost in meeting the regulatory objective,”¹²² among other analytical steps.

Second, legislation could apply these requirements to independent agencies (which administrations have been reluctant to do through executive order for fear of stirring up debate over the relationship between independent agencies and the President). For example, Independent Agency Regulatory Analysis Act of 2013¹²³ would allow the president by executive order to subject independent regulatory agencies to the executive analytical requirements applicable to other agencies. Several bills also attempted to impose analytical requirements on specific independent agencies, such as the FCC,¹²⁴ and the independent financial regulatory agencies.¹²⁵ When gathered at the OIRA 30th Anniversary conference hosted by the GW Regulatory Studies Center and the *Administrative Law Review*, former OIRA administrators of both parties agreed on the importance of engaging independent regulatory agencies in regulatory analysis and oversight.¹²⁶

Third, Congress could make compliance with them judicially reviewable.¹²⁷

Additionally, some bills emphasize certain features that members have found lacking in existing regulatory analysis requirements. For example, the small business community has been frustrated that courts have interpreted the RFA’s requirements to assess economic impact as applying only to direct compliance costs. They argue that agencies should consider reasonably foreseeable indirect economic impacts on

120. H.R. 4304, 113th Cong. (2014).

121. H.R. 3863 (CRS bill summary); H.R. 4304.

122. H.R. 3863 § 3(f)(1)(C).

123. S. 1173, 113th Cong. (2013).

124. Federal Communications Commission Process Reform Act of 2014, H.R. 3675, 113th Cong. (2014); FCC “ABCs” Act of 2013, H.R. 2649, 113th Cong. (2013); Federal Communications Commission Process Reform Act of 2014, S. 1989, 113th Cong. (2014).

125. SEC Regulatory Accountability Act, H.R. 1062, 113th Cong. (2013); Financial Regulatory Responsibility Act of 2013, S. 450, 113th Cong. (2013).

126. Symposium, *OIRA Thirtieth Anniversary Conference*, 63 ADMIN. L. REV. 1, 6 (2011).

127. See discussion *infra* Part IV.

small entities, such as increases in input prices (e.g., electricity, natural gas, or transportation) or state-level regulations issued pursuant to federal rules. This latter issue is particularly important for environmental regulations, where the “duty of regulating is passed on to the States . . . without any corresponding analysis or requirements for States to consider less burdensome alternatives for small business.”¹²⁸ The Regulatory Flexibility Improvements Act¹²⁹ would have amended the RFA to include “any indirect economic effect on small entities which is reasonably foreseeable.”¹³⁰

The analytical requirements of Title II of Unfunded Mandates Reform Act (UMRA)¹³¹ are similar to those in Executive Order 12,866. They both ask executive branch agencies to “assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector”¹³² and “select the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule.”¹³³ But UMRA’s coverage is much more limited than that of the Executive Order.¹³⁴ According to a CRS report, 72 percent of the economically significant rules covered by the Executive Order are not covered by UMRA.¹³⁵ This limited coverage is compounded by the fact that UMRA’s requirements for analyzing the effects of proposed regulations are largely informational, and judicial review does not impose meaningful consequences for noncompliance. A bill introduced in the 113th Congress, H.R. 899, would have provided more detailed criteria

128. *Legislation to Improve the Regulatory Flexibility Act Before the H. Comm. on Small Bus.*, 110th Cong. 5 (2007) (statement of Thomas Sullivan, Chief Counsel, Office of Advocacy, U.S. Small Business Administration).

129. H.R. 2542, 113th Cong. (2013) [hereinafter Regulatory Flexibility Improvements Act of 2013].

130. *Id.* § 2(b)(9)(B).

131. Pub. L. No. 104-4, 109 Stat. 48 (1995).

132. 2 U.S.C. § 1531 (2012).

133. *Id.* § 1535.

134. See Dudley, *Unfunded Mandates*, *supra* note 95, at 17 (“Section 4 of the Act lists seven exemptions (including, for example, for regulations that enforce constitutional rights of individuals, provide conditions for federal assistance, or are necessary for national security). UMRA’s title II provisions also do not apply to regulations issued by independent agencies, rules for which no proposal was issued, or rules implementing statutes that prohibit consideration of costs. Further, mandates are defined as ‘direct costs,’ or amounts governmental or private sector entities ‘will be required to spend in order to comply with the Federal private sector mandate,’ in contrast to the more encompassing term, ‘effects on the economy,’ used in Executive Order 12866.”).

135. ROBERT JAY DILGER & RICHARD S. BETH, CONG. RESEARCH SERV., R40957, UNFUNDED MANDATES REFORM ACT: HISTORY, IMPACT, AND ISSUES 27 (2010).

to federal agencies for assessing unfunded mandates and expanded consultation, among other things.¹³⁶ “To make the executive branch more accountable for the goals of UMRA, Congress could provide OMB oversight authority beyond certifying and reporting on agencies’ actions.”¹³⁷

2. Amendments to the APA

The bicameral Regulatory Accountability Act (RAA),¹³⁸ first introduced in the 112th Congress, would amend the Administrative Procedure Act. It was one of the more comprehensive legislative proposals introduced in the 113th Congress and encompassed analytical as well as procedural changes, codifying and extending some of the requirements in presidential executive orders. It was reintroduced in 2015.¹³⁹

The RAA would classify regulations into three categories: “high impact” rules, with estimated effects of \$1 billion or more in a year; “major” rules, defined (as in the Congressional Review Act) as having impacts of \$100 million or more in a year; and “other” rules.¹⁴⁰ It would also cover guidance documents, which are exempt from APA notice and comment procedures, and classify them as “major,” and “other.”¹⁴¹ Depending on their classification, rules and guidance documents would be subject to procedures beyond the notice and comment procedures currently embodied in the APA. Some of the key changes are summarized here:

- High impact and major regulations would begin with an advanced notice of proposed rulemaking (ANPRM), through which agencies would share and gather information before they develop an approach to address the identified problem through proposed rulemaking.¹⁴²
- High impact regulations would also be subject to a public hearing (akin to more adjudicatory procedures conducted under the “formal rulemaking” requirements), where rules of evidence

136. Unfunded Mandates Information and Transparency Act of 2013, H.R. 899, 113th Cong. (2013).

137. Dudley, *Unfunded Mandates*, *supra* note 95, at 20.

138. S. 1029, 113th Cong. (2013); H.R. 2122, 113th Cong. (2013).

139. Regulatory Accountability Act of 2015, H.R. 185, 114th Cong. (2015) (passing a House of Representatives vote on January 13, 2015, and currently referred to the Committee on Homeland Security and Governmental Affairs in the Senate).

140. S. 1029 § 2.

141. *Id.*

142. *Id.* § 3(c).

apply, and parties may both subpoena and cross-examine witnesses. Decisions must address each of the findings presented and be supported by “substantial evidence.”¹⁴³

- All final rules would include a plan for review at least every ten years, to “determine whether, based upon evidence, there remains a need for the rule, whether the rule is in fact achieving statutory objectives, whether the rule’s benefits continue to justify its costs, and whether the rule can be modified or rescinded to reduce costs while continuing to achieve statutory objectives.”¹⁴⁴
- The RAA would require the heads of agencies to certify that they have complied with the Information Quality Act (IQA),¹⁴⁵ which attempts to ensure the “quality, objectivity, utility, and integrity” of information disseminated to the public, and provides procedures by which affected parties can petition agencies to correct information that does not meet those standards.¹⁴⁶

As noted in the previous section, the Sound Regulation Act of 2014 would also have amended the APA to include both procedural and analytical steps when developing regulations.

3. Subject Significant Guidance Documents to Regulatory Review and Notice Requirements

Various authorities have raised concerns that agency guidance practices are sometimes used to circumvent rulemaking procedures and recommended that they “should be more transparent, consistent and accountable.”¹⁴⁷ To address that concern, the RAA and the Clearing Unnecessary Regulatory Burdens (CURB) Act¹⁴⁸ would have applied regulatory analysis requirements to guidance documents that have the effect of regulation.¹⁴⁹ CURB would codify OMB’s 2007 Good Guidance Practices Bulletin to ensure that significant guidance documents are subject to OIRA regulatory review as well as public notice and comment requirements. The Closing Regulatory Loopholes Act of

143. *Id.* § 3(e), § 3(g), § 6.

144. H.R. 2122, 113th Cong. § 3((f)(4)(G)(i) (2013).

145. Pub. L. No. 106-554, 114 Stat. 2763A-153 (2000) [hereinafter Information Quality Act].

146. *Id.* at 2763A-154; S. 1029 § 3(f)(4)(F).

147. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULLETIN NO. 07-027, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES (2007).

148. S. 1730, 113th Cong. (2013).

149. *Id.*

2013¹⁵⁰ would have required congressional approval of guidance documents.¹⁵¹

4. Incentives to Reexamine Existing Regulations

Most legislative and executive branch reforms have focused on analyzing and improving new regulations, and agencies seldom look back to evaluate the cumulative effects of regulations or whether existing regulations are having their intended effects. Section 610 of the RFA provides for periodic review of regulations for their impact on small businesses, but researchers have found that most agencies “comply with the letter of the law for only a small percentage of their rules, and they rarely take action beyond publishing a brief notice in the *Federal Register*.”¹⁵² The Regulatory Improvement Act of 2013¹⁵³ would have created a legislative commission to recommend regulations for modification and repeal by Congress.¹⁵⁴ Title VI of H.R. 4304 called for a “periodic review and termination of regulations”¹⁵⁵ and would have relied on sunset provisions and petition procedures to identify rules for review.

Congress has considered using budgeting concepts to alter regulatory agencies’ incentives to issue new regulations and examine the effectiveness of existing regulations.¹⁵⁶ In 1980, President Carter’s *Economic Report of the President* discussed proposals to “develop a ‘regulatory budget,’ similar to the expenditure budget, as a framework for looking at the total financial burden imposed by regulations, for setting some limits to this burden, and for making tradeoffs within those limits.”¹⁵⁷ The Report noted analytical problems with developing a regulatory budget but concluded that “tools like the regulatory budget may have to be developed” if governments are to “recognize

150. S. 320, 113th Cong. (2013).

151. *Id.*

152. Michael R. See, *Willful Blindness: Federal Agencies’ Failure to Comply with the Regulatory Flexibility Act’s Periodic Review Requirement—And Current Proposals to Invigorate the Act*, 33 FORDHAM URB. L.J. 1199, 1200 (2006).

153. S. 1390, 113th Cong. (2013).

154. *Id.*

155. Jumpstarting Opportunities with Bold Solutions Act, H.R. 4304, 113th Cong. (2014).

156. See *Federal Regulation: A Review of Legislative Proposals Before S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 124 (2011) (statement of Sen. Rob Portman) (noting the Unfunded Mandates Reform Act would require “cost-benefit analysis of economically significant rules” and require agencies to select the “Least Onerous Alternative”).

157. 1980 ECONOMIC REPORT, *supra* note 117.

that regulation to meet social goals competes for scarce resources with other national objectives,” and set priorities to achieve the “greatest social benefits.”¹⁵⁸

The National Regulatory Budget Act¹⁵⁹ would have established an independent executive office responsible for reporting annually to Congress on the costs of existing regulations and the costs of proposed new regulations. Congress would use these data to establish binding regulatory caps for each executive regulatory agency.¹⁶⁰

The United Kingdom has adopted a “one-in, two-out” approach to regulation that shares similarities with a regulatory budget in that “departments have to remove or modify existing regulation(s) to the value of £2 of savings for every pound of cost imposed,”¹⁶¹ and members of the U.S. Senate are considering similar legislation currently under development.¹⁶² A “regulatory paygo” “would require federal agencies to identify and eliminate one existing regulation for each new regulation they want to add.”¹⁶³ Regulatory agencies, with oversight from OIRA and either the Congressional Budget Office (CBO) or the GAO, would be required to eliminate one outdated or duplicative regulation before issuing a new regulation of the same approximate economic impact.

Unlike a regulatory budget, agencies would only have to estimate costs for regulations being introduced (which they should already do) and offsetting regulations they propose to remove. While still subject to analytical challenges, a regulatory “paygo” has the potential to impose some needed discipline on regulatory agencies and to generate a constructive debate on the real impacts of regulations. Focusing on the costs of regulations and allowing agencies to set priorities and make tradeoffs among regulatory programs might remove some of the contentiousness surrounding benefit-cost analysis. Congress would probably need to establish regulatory burden baselines in new authorizing legislation, unless they expect those costs to be offset with existing regulations.¹⁶⁴

158. *Id.* at 126 (1980).

159. S. 2153, 113th Cong. (2014); H.R. 5184, 113th Cong. (2014).

160. *Id.*

161. Dep’t for Bus., Innovation & Skills, *One-in, Two-out: Statement of New Regulation*, GOV.UK (last updated July 9, 2014), <https://www.gov.uk/government/collections/one-in-two-out-statement-of-new-regulation#documents>.

162. *See Federal Regulation: A Review of Legislative Proposals Before the S. Comm. on Homeland Sec. and Governmental Affairs*, 112th Cong. 172 (2011) (statement of Sen. Mark R. Warner) (discussing his proposal “to improve cost accountability for federal regulations”).

163. Mark R. Warner, *Red-tape Relief for a Sluggish Recovery*, WASH. POST, Dec. 13, 2010, at A19.

164. *See* Dudley, *Unfunded Mandates*, *supra* note 95, at 21.

III. LEGISLATIVE BRANCH OVERSIGHT OF REGULATION

As noted above, Congress has not taken full advantage of its “‘awesome arsenal’ of weapons”¹⁶⁵ for controlling agencies’ actions.¹⁶⁶ Members do use oversight hearings and occasionally use appropriations to limit agencies’ ability to develop or enforce regulations,¹⁶⁷ but as Justice Elena Kagan has noted, “the complaint-driven nature of congressional oversight, especially in combination with its reliance on committees . . . pushes toward the ad hoc rather than the systematic consideration of administrative policy.”¹⁶⁸ Recent Congresses have introduced legislation that would strengthen the legislative branch’s own ability to control regulation. One approach would require a congressional vote before major new regulations can become effective (the REINS Act), and another would establish a congressional office to review and evaluate regulations.

A. *The REINS Act*¹⁶⁹

The Regulations from the Executive In Need of Scrutiny (REINS) Act,¹⁷⁰ which has been introduced in each of the last three Congresses, and passed the House of Representatives in the 113th Congress,¹⁷¹ is designed to “increase accountability for and transparency in the federal regulatory process.”¹⁷² It “is patterned after the 1996 CRA, providing expedited procedures for evaluating and voting on major regulations,”¹⁷³ but it would change the default outcome. Rather than requiring Congress to enact a “joint resolution of disapproval” to prevent a rule from going into effect, no major rule could go into effect until Congress enacted an affirmative “joint resolution of approval.”¹⁷⁴

165. WILSON, *supra* note 79, at 236 (quoting HERBERT KAUFMAN, *THE ADMINISTRATIVE BEHAVIOR OF FEDERAL BUREAU CHIEFS* 164 (1981)).

166. Kagan, *supra* note 5, at 2257–58.

167. CURTIS W. COPELAND, CONG. RESEARCH SERV., RL34354, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS RESTRICTIONS 1–2 (2008).

168. Kagan, *supra* note 5, at 2260.

169. Although this Article discusses the REINS Act in context of its 113th Congress introduction, since the writing of the Article, the act has been introduced to the 114th Congress. Regulations from the Executive in Need of Scrutiny (REINS) Act, S. 226, H.R. 427, 114th Cong. (2015).

170. H.R. 367, 113th Cong. (2013).

171. It was also introduced in the Senate. S. 15, 113th Cong. (2013).

172. H.R. 367 § 2.

173. Dudley, *supra* note 86, at 10.

174. H.R. 367 § 802.

This would be a significant change to the current regulatory procedures and would likely change the incentives and behavior of legislators, regulators, and affected parties in positive and negative ways.¹⁷⁵ Opponents argue that current procedures, where Congress delegates regulatory decision-making to agencies, are “consistent with the Framers’ intention”¹⁷⁶ and provide sufficient regulatory constraint on executive agencies through (1) authorizing legislation, (2) the APA public comment process, (3) executive branch review and oversight, (4) the threat of a resolution of disapproval under the CRA, and (5) judicial review.¹⁷⁷ They also argue that expert agencies are in a better position to make complex regulatory decisions than political officials.¹⁷⁸

Others defend the constitutionality of the Act¹⁷⁹ and see it as way to “force Members to take responsibility for the laws they pass, and to force Administrations to be accountable for the laws they create through regulation.”¹⁸⁰ Many federal regulations being promulgated today depend on legislation passed decades ago by different congresses focused on different concerns. The REINS Act would ensure that major regulations based on authority delegated years ago could only be adopted with consent from the current Congress.¹⁸¹

175. For a discussion of these incentives, see Dudley, *supra* note 86.

176. Sidney Shapiro, The REINS Act: The Latest Conservative Plan to Gum Up the Regulatory Works, CPRBlog (Jan. 14, 2011), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=84F5CF0B-E804-F8D1-7197786456C5DC4F>.

177. *REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations: Hearing on H.R. 10 Before the Subcomm. on Courts, Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 90-92 (2011) (statement of Sally Katzen).

178. SIDNEY SHAPIRO, CTR. FOR PROGRESSIVE REFORM, CPR BACKGROUNDER: THE REINS ACT: THE CONSERVATIVE PUSH TO UNDERCUT REGULATORY PROTECTIONS FOR HEALTH, SAFETY, AND THE ENVIRONMENT (2011).

179. Jonathan H. Adler, *The Regulations from the Executive in Need of Scrutiny (REINS) Act*, THE FEDERALIST SOC’Y FOR LAW & PUB. POLICY STUDIES (Jan. 14, 2011), <http://www.fed-soc.org/publications/detail/the-regulations-from-the-executive-in-need-of-scrutiny-reins-act>; *REINS Act—Promoting Jobs and Expanding Freedom by Reducing Needless Regulations*, *supra* note 177, at 83-84 (statement of Jonathan H. Adler, Professor of Law and Director of the Center for Business Law and Regulation, Case Western Reserve University School of Law); *id.* at 44-45 (statement of David McIntosh, Member of Congress, retired).

180. Editorial, *The Congressional Accountability Act*, WALL ST. J., Jan. 14, 2011, <http://www.wsj.com/articles/SB10001424052970203525404576049703586223080>.

181. Adler, *supra* note 179.

B. Create a Congressional Regulatory Oversight Body

The President's Council on Jobs and Competitiveness encouraged Congress to consider a congressional staff, modeled on the CBO or GAO, to review agencies' regulatory analysis and the cumulative effects of existing regulations.¹⁸²

The Truth in Regulating Act of 2000¹⁸³ required the GAO independently to evaluate agencies' regulatory impact analyses supporting final regulations, but this requirement was contingent upon the GAO receiving yearly appropriations of \$5,200,000.¹⁸⁴ These funds have never been appropriated.

The Strengthening Congressional Oversight of Regulatory Actions for Efficiency Act¹⁸⁵ would have created an office within the Congressional Budget Office with responsibility for assessing the impact of federal rules and regulations.

A non-executive branch agency responsible for reviewing regulations would have several benefits.¹⁸⁶ Most importantly, it would serve as an independent check on the analysis and decisions of regulatory agencies and OMB.¹⁸⁷ A 1999 GAO report evaluating OMB's annual reports to Congress on the benefits and costs of regulation observed,

It is politically difficult for OMB to provide an independent assessment and analysis of the administration's own estimates in a public report to Congress. If Congress wants an independent assessment of executive agencies' regulatory costs and benefits, it may have to look outside of the executive branch or outside of the federal government.¹⁸⁸

While a congressional office would not have the same authority OMB exercises to affect agency draft regulations, it would be able to devote resources to areas OMB cannot, "such as examining the effects of regulations issued by independent regulatory agencies."¹⁸⁹ "Just as

182. PRESIDENT'S COUNCIL ON JOBS AND COMPETITIVENESS, ROADMAP TO RENEWAL: INVEST IN OUR FUTURE, BUILD ON OUR STRENGTHS, PLAY TO WIN 45 (2011).

183. Pub. L. No. 106-312, 114 Stat. 1248-50 (2000).

184. *Id.* at 1249.

185. S. 1472, 113th Cong. (2013).

186. See ROBERT W. HAHN & ROBERT E. LITAN, RECOMMENDATIONS FOR IMPROVING REGULATORY ACCOUNTABILITY AND TRANSPARENCY (2003).

187. *Id.* at 11.

188. GAO, ANALYSIS OF OMB'S REPORTS, *supra* note 104, at 5.

189. Susan Dudley, *Congress Needs Its Own Regulatory Review Office*, PENN PROGRAM ON REGULATION: REG BLOG (Aug. 10, 2011), <http://www.law.upenn.edu/blogs/regblog/2011/08/congress-needs-its-own-regulatory-review-office.html>.

the CBO provides independent estimates of the on-budget costs of legislation and federal programs, a congressional regulatory office could provide Congress and the public independent analysis [regarding] the likely off-budget effects of” legislation and regulation.¹⁹⁰ This would be particularly important if Congress enacts some of the other procedural changes being discussed, such as the REINS Act or a regulatory paygo.¹⁹¹

IV. JUDICIAL BRANCH OVERSIGHT OF REGULATION

Under the APA, after a regulatory agency issues a final rule, an affected party may challenge it in court. Reviewing courts may reverse or remand the rule to the agency for reconsideration on constitutional grounds, on procedural grounds (whether the agency followed the procedures specified in the APA), or on the basis of the agency’s interpretation of the authorizing statute.

A. *Changes to the Standard by Which Courts Review Regulations*

The courts review regulations issued through informal rulemaking procedures under the “arbitrary and capricious” standard of review,¹⁹² while regulations issued under formal rulemaking procedures are subject to a “substantial evidence” standard.¹⁹³ The substantial evidence standard directs a reviewing court to set aside an agency action unless the record provides “such relevant evidence as a reasonable person would accept as adequate to support a conclusion.”¹⁹⁴ It is arguably a more exacting standard than “arbitrary and capricious,” which grants considerable deference to agency expertise. Substituting a substantial evidence test could motivate agencies to develop and provide better scientific and technical data and analysis in support of regulations.¹⁹⁵ Some argue that the substantial evidence test used as part of an informal (or even hybrid) regulatory proceeding would differ very little from an arbitrary and capricious test, however.¹⁹⁶ The RAA would

190. *Id.*

191. *Id.*

192. 5 U.S.C. § 706(2)(A) (2012).

193. *Id.* § 706(2)(E).

194. *Mareno v. Apfel*, 1999 U.S. Dist. LEXIS 8575, at *6-7 (S.D. Ala. Apr. 8, 1999) (describing the evidence standard as “more than a scintilla but less than a preponderance”).

195. Eve E. Bachrach, *The Case for a Substantial Evidence Amendment to the Informal Rulemaking Provision of the Federal Food, Drug, and Cosmetic Act*, 55 FOOD & DRUG L.J. 293, 297-99 (2000); *Is Reform Needed*, *supra* note 24 (statement by Howard Coble).

196. *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 745 F.2d 677, 684 (D.C. Cir. 1984) (“In review of rules of

subject major and high impact final regulations to the substantial evidence standard of review.¹⁹⁷

B. Judicial Review of Regulatory Impact Analysis

Presidential executive orders governing regulatory impact analysis have stated that their requirements are not enforceable by law¹⁹⁸; however, several bills introduced in the 113th Congress would change that.¹⁹⁹ “Judicial review could be valuable—not because the courts have a particular expertise in regulatory analysis but because agencies tend to take more seriously aspects of their mission that are subject to litigation. Like executive and congressional oversight, judicial oversight would likely make regulatory agencies more accountable for better decisions based on better analysis.”²⁰⁰

Courts have overturned several regulations of the Securities and Exchange Commission as being arbitrary and capricious and in violation of the APA, finding that compliance with the Commission’s statutory criteria demanded a more rigorous analysis of benefits and costs to evaluate the “rule’s effects on efficiency, competition, and capital formation.”²⁰¹

general applicability made after ‘notice and comment’ rule-making, [substantial evidence and arbitrary or capricious] criteria converge into a test of reasonableness.”); Matthew J. McGrath, Note, *Convergence of the Substantial Evidence and Arbitrary and Capricious Standards of Review During Informal Rulemaking*, 54 GEO. WASH. L. REV. 541 (1986).

197. H.R. 2122, 113th Cong. § 6 (2013) [hereinafter Regulatory Accountability Act].

198. See Exec. Order No. 12,866, 3 C.F.R. 638 (1994) (“*Judicial Review*. Nothing in this Executive order shall affect any otherwise available judicial review of agency action. This Executive order is intended only to improve the internal management of the Federal Government and does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.”).

199. For a summary of bills, see *Status of Regulatory Reform Legislation, 113th Congress*, REG. STUDIES CTR., <http://regulatorystudies.columbian.gwu.edu/status-regulatory-reform-legislation-113th-congress> (last visited Mar. 23, 2015).

200. SUSAN DUDLEY, GEORGE WASH. UNIV. REG. STUDIES CTR., PREPARED STATEMENT OF SUSAN E. DUDLEY, HEARING ON FEDERAL REGULATION: A REVIEW OF LEGISLATIVE PROPOSALS, PART II, at 17 (2011).

201. For a discussion of recent cases, see Jane C. Luxton, *An Uncomfortable Wake-Up Call for Dodd-Frank Regulators*, CLIENT ALERT (Pepper Hamilton, LLP, Berwyn, Pa.), available at <http://www.pepperlaw.com/pdfs/ClientAlert021012.pdf>.

C. Judicial Review of Statutory Requirements

Congress has considered legislative amendments that would provide for judicial review of statutory requirements, such as those encompassed in the Information Quality Act,²⁰² the Regulatory Flexibility Act,²⁰³ and the Unfunded Mandates Reform Act.²⁰⁴ For example, the IQA does not explicitly provide for judicial review of agency denials of requests for correction, and to date, courts have chosen not to try cases that have been brought.²⁰⁵ The RAA would have required the heads of agencies to certify that they have complied with the IQA and subject compliance with the IQA to judicial review.²⁰⁶ Responding to concerns noted above, the Regulatory Flexibility Improvement Act would have provided for judicial review of final agency actions.²⁰⁷

Congress also considered legislation (such as H.R. 899)²⁰⁸ that would make compliance with UMRA requirements judicially reviewable under the APA, so that an agency's failure to justify not selecting the "least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule"²⁰⁹ could be grounds for staying, enjoining, invalidating, or otherwise affecting such agency rule.

CONCLUSION

All three branches of government have responsibility under the Constitution for ensuring accountable regulation by providing checks and balances against each other. Over the last century, they have experimented with approaches to improving the outcomes of administrative laws by controlling the procedures and principles by which regulations are generated. With concern over regulatory impacts rising, proposals for regulatory reform are gaining traction in the executive, legislative, and judiciary branches of government. The 114th Congress is likely to consider legislation to reform the procedures by which

202. Information Quality Act, *supra* note 145, at 2763A-153-154.

203. Regulatory Flexibility Act, *supra* note 49, at 1169-70.

204. Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48, 70-71 (1995).

205. For different perspectives on this issue, see James W. Conrad Jr., *The Information Quality Act—Antiregulatory Costs of Mythic Proportions?*, 12 KAN. J.L. & PUB. POL'Y 521, 538 (2003); SIDNEY A. SHAPIRO, RENA STEINZOR & MARGARET CLUNE, OSSIIFYING OSSIFICATION: WHY THE INFORMATION QUALITY ACT SHOULD NOT PROVIDE FOR JUDICIAL REVIEW 1, 9 (2006).

206. Regulatory Accountability Act, *supra* note 197.

207. Regulatory Flexibility Improvements Act of 2013, *supra* note 129.

208. Unfunded Mandates Information and Transparency Act of 2013, *supra* note 136.

209. 2 U.S.C. § 1535 (2012).

regulations are issued, clarify the decision criteria agencies use to develop regulations, and take responsibility for the content of individual regulations promulgated pursuant to statutes. While none of the major regulatory reform legislation considered by the 113th Congress passed, the bills considered there may have laid the groundwork for reforms in 2015. Like the bipartisan, inter-branch regulatory reform efforts of the 1970s and 1980s, which brought about unexpected innovation, higher quality and lower prices in previously regulated industries, reforms today could spur economic growth and improve the welfare of American families, workers, and entrepreneurs.

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Regulatory Science and Policy
A Case Study of the National Ambient Air Quality Standards

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ABSTRACT

This paper explores the motivations and institutional incentives of participants involved in the development of regulation aimed at reducing health risks, with a goal of understanding and identifying solutions to what the Bipartisan Policy Center has characterized as “a tendency to frame regulatory issues as debates solely about science, regardless of the actual subject in dispute, [that] is at the root of the stalemate and acrimony all too present in the regulatory system today.” We focus our analysis with a case study of the procedures for developing National Ambient Air Quality Standards under the Clean Air Act, and attempt to identify procedural approaches that bring greater diversity (in data, expertise, experience, and accountability) into the decision process.

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Regulatory Science and Policy

A Case Study of the National Ambient Air Quality Standards

Susan E. Dudley²

September 9, 2015

Regulations intended to address public health and environmental risks depend heavily on scientific information. These regulations are often the subject of heated debate, involving accusations of “politicized science,” “advocacy science,” and “junk science.” While it is legitimate to want to protect the integrity of scientific findings, more often than not, these policy debates center on issues that science can inform, but not decide.

No one is immune to the temptation to put a spin on science to advance a policy goal, therefore, it is useful to distinguish between two distinct types of problems leading to controversy over science as it is used in the regulatory process. Problems arise when political decision-makers attempt to distort what scientific studies conclude (we call this “politicization of science”), but problems also arise when scientists and others attempt to exert influence on policy decisions by selectively presenting, or even distorting, scientific findings (we call this “scientization of policy”).

While media coverage of issues ranging from genetically-modified organisms to climate change decries the first problem, the Bipartisan Policy Center’s (BPC) 2009 report, *Improving the Use of Science in Regulatory Policy*, emphasized the latter, observing that “a tendency to frame regulatory issues as debates solely about science, regardless of the actual subject in dispute, is at the root of the stalemate and acrimony all too present in the regulatory system today.”³

This tendency has contributed to what Wendy Wagner has called the “science charade,” where regulatory agencies “camouflag[e] controversial policy decisions as science.”⁴

This paper focuses on the scientization of policy and examines why it is a problem, the institutional incentives that contribute to it, and possible remedies. We begin by describing what we mean by the scientization of policy, and illustrate this with a case study of the incentives and

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³ Bipartisan Policy Center. *Improving the Use of Science in Regulatory Policy*. Washington (DC): Bipartisan Policy Center; 2009;10. Available at: <http://www.bipartisanpolicy.org/sites/default/files/BPC%20Science%20Report%20final.pdf> “BPC”

⁴ Wagner, W.E. The Science Charade in Toxic Risk Regulation. *Columbia Law Review*. 1995 Nov;95(7): 1614; 29.

behavior of the participants in the development of national ambient air quality standards (NAAQS) under the Clean Air Act.⁵ We conclude with recommendations for changing those incentives.

1. THE SCIENTIZATION OF POLICY

Science is rarely sufficient for making policy decisions for two reasons. First, while science is essential for understanding the positive question of *what is*, or predicting what outcomes might obtain under different scenarios, it is not determinative for the normative (policy) decisions regarding what *should be*. In the context of health, safety, and environmental regulation, in 1983 the National Research Council (NRC) of the National Academy of Sciences described the following conceptual framework:

Regulatory actions are based on two distinct elements, risk assessment... and risk management. Risk assessment is the use of the factual base to define the health effects of exposure of individuals or populations to hazardous materials and situations. Risk management is the process of weighing policy alternatives and selecting the most appropriate regulatory action, integrating the results of risk assessment with engineering data and with social, economic, and political concerns to reach a decision.⁶

Risk assessment is necessary, but rarely sufficient, for establishing effective policy to address identified risks. Sound policy decisions must also weigh other factors, such as those related to economics, engineering, ethics, law, and politics. Failure to recognize this is what we will call the “positive-normative fallacy.”

Second, even in the risk assessment phase of an analysis, scientists will never have complete information to predict outcomes with certainty, so analysts rely on what the NRC called “risk assessment policy” – assumptions, judgments, and rules of thumb – to guide the use of scientific information in analyses that inform policy in the face of uncertainty.

In each step [of the risk assessment process], a number of decision points (components) occur where risk to human health can only be inferred from the available evidence. Both scientific judgments and policy choices may be involved in selecting from among possible inferential bridges, and we have used the term

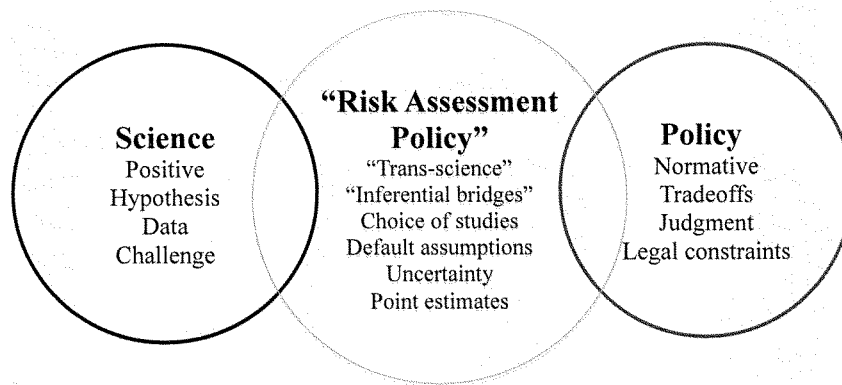
⁵ The Clean Air Act, 42 U.S.C. § 7408 Available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2008-title42/pdf/USCODE-2008-title42-chap85.pdf>

⁶ National Research Council and the Committee on the Institutional Means for Assessment of Risks to Public Health. Risk Assessment in the Federal Government: Managing the Process. 1983. Washington D.C.: National Academies Press. “NAS Red Book”

risk assessment policy to differentiate those judgments and choices from the broader social and economic policy issues that are inherent in risk management decisions.⁷

Figure 1 illustrates the relationship between pure scientific inputs and policy decisions, and the role of “trans-science”⁸ and judgment in interpreting and presenting evidence relevant to policy. “Risk assessment policy” includes various judgments, including: judgments about which science is considered; how individual studies are weighed and combined; when competing theories are considered appropriately supported for inclusion; which models to use; and in general, what to do in the face of scientific uncertainty. It also guides the way in which risks are characterized and communicated.⁹

Figure 1. Science, Policy, and “Risk Assessment Policy”



Based on Dudley and Gray, “Improving the Use of Science to Inform Environmental Regulation,” in *Institutions and Incentives in Regulatory Science*, Lexington Books, Jason Johnston ed. (2012)

Policymakers and the public are often unaware of the influence of these risk assessment policy choices or the existence of alternative choices that are equally plausible. Instead, assessments

⁷ NAS Red Book, 1983.

⁸ Weinberg, Alvin M. “Science and Trans-science.” *Minerva* 1972, 10(2), 209-222. “I propose the term trans-scientific for these questions since, though they are, epistemologically speaking, questions of fact and can be stated in the language of science, they are unanswerable by science; they transcend science... Scientists have no monopoly on wisdom where this kind of trans-science is involved...”

⁹ Dudley, SE & Gray, GM. “Improving the Use of Science to Inform Environmental Regulation,” in *Institutions and Incentives in Regulatory Science*, Lexington Books, Jason Johnston ed. (2012)

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often generate precise-sounding predictions that hide not only considerable uncertainty about the actual risk, but the reliance on biased inferences and assumptions for handling that uncertainty.¹⁰ In this paper, we term this “hidden policy judgments.” While some judgment is necessary to translate scientific evidence into risk assessment, current risk assessment policies are not transparent, and lead to distortions in risk estimates and false precision in the presentation of scientific information.¹¹ These practices obscure the boundary between science and policy, and contribute to the scientization of policy.

Former EPA scientist Robert T. Lackey cautions against this problem, which he calls “normative science”:

Science should be objective and based on the best information available. Too often, however, scientific information presented to the public and decision-makers is infused with hidden policy preferences. Such science is termed normative, and it is a corruption of the practice of good science. Normative science is defined as “information that is developed, presented or interpreted based on an assumed, usually unstated, preference for a particular policy choice.”¹²

In its 2011 evaluation of EPA’s Integrated Risk Information System (IRIS) assessment for formaldehyde, the National Academy of Sciences raised concerns about recurring “problems with clarity and transparency of the methods”:

In general, the committee found that the draft was not prepared in a consistent fashion; it lacks clear links to an underlying conceptual framework; and it does not contain sufficient documentation on methods and criteria for identifying evidence from epidemiologic and experimental studies, for critically evaluating individual studies, for assessing the weight of evidence, and for selecting studies for derivation of the [reference dose] RfCs and unit risk estimates.¹³

¹⁰ For example, EPA’s “Risk Assessment Principles and Practices” document states: “[s]ince EPA is a health and environmental protective agency, EPA’s policy is that risk assessments should not knowingly underestimate or grossly overestimate risks. This policy position prompts risk assessments to take a more ‘protective’ stance given the underlying uncertainty with the risk estimates generated.” (USEPA 2004, 13-14)

¹¹ Gray, G. & Cohen, J. “Rethink Chemical Risk Assessment.” *Nature*. 2012 Sep; 489. P. 27: “the problem is the EPA’s use of assumptions that it claims are ‘public health protective,’ which err on the side of overstating risk when data are lacking.... Such inflated risk estimates can lead to overly stringent regulations and can scramble agency priorities because the degree of precaution differs across chemicals.”

¹² Lackey, Robert T. “Normative Science.” *Terra Magazine*. Oregon State University. 2013;8(2).

¹³ Committee to Review EPA’s Draft IRIS Assessment of Formaldehyde; National Research Council. *Review of the Environmental Protection Agency’s Draft IRIS Assessment of Formaldehyde*. Washington (DC): National Academy of Sciences; 2011: 4. Available at: http://www.nap.edu/catalog.php?record_id=13142

Institutional arrangements in the regulatory development process tend to aggravate these two contributors to the scientization of policy: the “positive-normative fallacy” (not acknowledging that science alone is insufficient to resolve normative policy questions) and “hidden policy judgments” (not acknowledging the policy judgments inherent in risk assessment). By framing issues as resolvable by science, current practices both threaten the credibility of the scientific process, and harm resulting regulatory policy. Many of those involved in regulatory decisions have incentives to hide rather than reveal the uncertainty in assessments of risk¹⁴ and to dismiss and denigrate dissenting views.¹⁵ Key policy choices, disguised as science, rest with technical staff; meanwhile, policy makers charged with making hard policy decisions are able to avoid responsibility by claiming that their hands were tied by the science.

When questions involving policy judgment and values are falsely characterized as scientific, a small number of people have disproportionate influence on the information that is used and how it is characterized, leading to decisions that are not as accountable or as transparent as they should be. This is exacerbated by the adversarial nature of rulemaking, by the reluctance of courts to review scientific findings, and by group dynamics that discourage differences of opinion, mask uncertainty, and give short shrift to alternative perspectives.

The process by which EPA sets National Ambient Air Quality Standards (NAAQS) for “criteria pollutants”¹⁶ under the Clean Air Act illustrates some of the perverse incentives involved in developing regulations, which lead to controversy, lack of transparency, and misdirected resources. The NAAQS process is particularly worth examining, because on the one hand it is held up by some as an ideal by which all science-based rulemaking should be developed,¹⁷ but on the other, NAAQS decisions are among the most controversial of EPA policies. Each of the last three presidents has taken the highly unusual step of publicly and personally intervening in EPA’s regulatory decisions.¹⁸

¹⁴ According to Wagner, “It would seem that such science-based mandates not only invite, but actually compel the science charade due to the threat of reversal if an agency frankly acknowledges the inherent scientific uncertainties and its requisite retreat to economic, technological, and other policy considerations in reaching a final, quantitative standard.” Wagner 1995 at 1668.

¹⁵ For example, see posts by the Center for Progressive Reform (<http://www.progressivereform.org/13RulesOzone.cfm>) and the Center for Regulatory Solutions (<http://centerforregulatoryolutions.org/will-epas-ozone-ambitions-reveal-more-collaboration-with-green-groups/>)

¹⁶ The Clean Air Act, 42 U.S.C. § 7408 (a)(1) identifies six “criteria pollutants”: particulate matter, ground-level ozone, carbon monoxide, sulfur oxides, nitrogen oxides, and lead. Available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2008-title42/pdf/USCODE-2008-title42-chap85.pdf>

¹⁷ Wagner, W. “Science in Regulation: A Study of Agency Decision making Approaches” (referring to the NAAQS development process as “the equivalent of a five-star process for incorporating science into regulatory policy.”) 2013: 29. Available at: <http://acus.gov/report/science-regulation-final-report>

¹⁸ EPA’s 1997 standards for ozone and fine particles were debated extensively at the cabinet level and, on issuance of the final regulations, President Clinton took the unprecedented step of writing a public memorandum to the

Using NAAQS as a case study, the next section explores the procedures for developing regulations and the institutional incentives that may contribute to the two components of scientization of policy problem identified here: the positive-normative fallacy and hidden policy judgment.

2. PARTICIPANTS IN THE RULEMAKING PROCESS, THEIR MOTIVES & BEHAVIOR

The development of regulation in the United States involves several steps and numerous parties. First, Congress must pass and the President must sign legislation authorizing regulation. Legislation addressing health and environmental risks generally expresses broad goals and objectives, but leaves fact-finding and the details of implementation to executive branch agencies, such as EPA.¹⁹ Regulatory agencies then develop draft proposed regulations consistent with the language in the enabling legislation and according to procedures mandated by both Congress and the President.²⁰ In particular, the Administrative Procedure Act requires regulatory agencies to notify the public and seek comment on proposed regulations, and to base final regulations on information in the rulemaking record.²¹ This notice-and-comment process guarantees interested parties (those affected by potential regulation, non-governmental organizations, and others) an opportunity to present views and information on proposed

EPA Administrator on “Implementation of Revised Air Quality Standards for Ozone and Particulate Matter,” to “ensure that the new standards are implemented in a common sense, cost-effective manner.” Available at: <http://www.gpo.gov/fdsys/pkg/WCPD-1997-07-21/pdf/WCPD-1997-07-21-Pg1080.pdf>) (See Fraas 2011 at 81-85 for an insider’s account of the 1997 deliberations.) In 2008, EPA again faced objections from other agencies, as well as from state and local governments, when it proposed to revise the ozone standard. President George W. Bush was called in to settle the dispute, following the rarely used section 7 of E.O. 12866 regarding the resolution of conflicts. He decided the dispute over the appropriate form of the welfare standard by directing EPA Administrator Stephen Johnson to set it at a level identical to the primary standard. Available at: http://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQS_final_3-13-08_2.pdf In 2011, the President intervened again. EPA was poised to revise the ozone standard amid strong objections from other parts of the government and the regulated community, when President Obama took the unusual step of “request[ing] that Administrator Lisa Jackson withdraw the draft ozone NAAQS” from interagency review. Available at: <http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards>. This is the only time during President Obama’s administration that the White House has returned a regulation to an agency.

¹⁹ Shoenbrod, David. *Power without Responsibility: How Congress Abuses the People through Delegation*. Yale University Press. 1995.

²⁰ Dudley, S.E. & Brito, J. *Regulation: A Primer*. Washington, DC: The George Washington University Regulatory Studies Center and Mercatus Center, George Mason University; 2012.

²¹ Administrative Procedure Act (5 U.S.C. Subchapter II) Available at: <http://www.archives.gov/federal-register/laws/administrative-procedure/>

regulations.²² Additionally, since 1981, presidents have required agencies to conduct regulatory impact analyses of economically significant regulations, and to subject them to interagency review through the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget.²³ Congress has an opportunity to issue a joint resolution to disapprove a final regulation after it is published,²⁴ and regulations are also subject to judicial review (allowing affected parties to sue to have regulations overturned by the courts).²⁵ Throughout the rule development process and beyond, media will also track and report on regulations and any controversies that may arise.

The behavior of each party in the regulatory development process is influenced by these institutional structures and constraints, and the incentives they provide, as a case study of the NAAQS development process illustrates.

2.1. Authorizing Legislation

The Clean Air Act of 1970 (P.L. 91-604) directed the newly created Environmental Protection Agency to issue NAAQS for each pollutant for which the Health, Education, and Welfare Department had already issued air quality criteria, and for widespread air pollutants identified in the future that reasonably may be expected to endanger public health or welfare.²⁶

The Act directed the EPA Administrator to set “primary,” or health-based, NAAQS at levels that are “requisite to protect the public health ... allowing an adequate margin of safety,”²⁷ based on “air quality criteria [that] shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities.”²⁸ It further required the Administrator to set “secondary” (welfare-based) standards based on these

²² Balla, S.J. “Public Commenting on Federal Agency Regulations: Research on Current Practices and Recommendations to the Administrative Conference of the United States.” Washington (DC) 2011. Available at: <http://www.acus.gov/sites/default/files/documents/Consolidated-Reports-%2B-Memoranda.pdf>

²³ See Executive Orders 13563 and 12866 governing regulatory analysis and oversight. Available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/eo12866/eo13563_01182011.pdf

²⁴ The Congressional Review Act of 1996 (5 U.S.C. § 801-808) Available at: <http://www.archives.gov/federal-register/laws/congressional-review/>.

²⁵ Dudley, S.E. & Brito, J. 2012.

²⁶ For a thorough review of the history of NAAQS, see Bachmann, John. “Will the Circle Be Unbroken: A History of the U.S. National Ambient Air Quality Standards.” *Journal of the Air & Waste Management Association*. Volume 57, Issue 6, 2007. He finds, “Even a cursory look at the history of the NAAQS and air pollution shows that developments are subject to what is sometimes called big “P” (i.e., partisan) and little “p” (e.g., interagency or office) politics and all of the changing societal, economic, cultural, and other influences related to a particular time and place.” Bachmann, 2007: 655.

²⁷ The Clean Air Act, 42 U.S.C. § 7408 (b)(1)

²⁸ The Clean Air Act, §108(a)(2)

criteria at a level “requisite to protect the public welfare from any known or anticipated adverse effects.”²⁹

Amendments to the Clean Air Act in 1977 (P.L. 95-95) required the Administrator to conduct a “thorough review of the criteria...and promulgate such new standards as may be appropriate,” at least every five years.

The Supreme Court has confirmed EPA’s interpretation that, when it sets primary standards, the statutory language precludes consideration of the costs of achieving the standard.³⁰ Thus the Clean Air Act itself, at least in this reading, succumbs to the positive-normative fallacy by framing the Administrator’s decision as resolvable by considering science alone, despite statutory language such as “requisite to protect public health,” and “adequate margin of safety,” which are clearly normative.³¹

The statutory framing makes it difficult to follow the BPC’s first recommendation that “when federal agencies are developing regulatory policies, they explicitly differentiate, to the extent possible, between questions that involve scientific judgments and questions that involve judgments about economics, ethics and other matters of policy.”³²

According to Schoenbrod:

The legislative history and reality made clear that EPA was not to set the ambient standards at zero. So EPA would necessarily have to leave some threat to health. The statute evaded the question of how much. The evasion was intentional. As the author of the Clean Air Act, Senator Edmund Muskie, later admitted, “[o]ur public health scientists and doctors have told us that there is no threshold, that any air pollution is harmful. The Clean Air Act is based on the assumption, although

²⁹ The Clean Air Act, 42 U.S.C. § 7408 (b)(2)

³⁰ *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001) 99-1426.175 F.3d 1027 and 195 F.3d 4, affirmed in part, reversed in part, and remanded.

³¹ An amicus brief in this case, signed by a bipartisan group of 42 prominent economists, including five Nobel Laureates, argued: “We believe that it would be imprudent for the EPA to ignore costs totally. Not considering costs makes it difficult to set a defensible standard, especially when there is no threshold level below which health risks disappear.” Arrow, K.J. et. Al. National Ambient Air Quality Standards (NAAQS) Brief. Washington (DC): Joint Center, AEI-Brookings Joint Center for Regulatory Studies; 2000 July. Available at: http://www.brookings.edu/~media/research/files/reports/2000/7/naaqs%20litan/07_naaqs_litan.pdf A former EPA science advisor observed regarding EPA’s position that it “is not supposed to take cost into account in promulgating standards,” “does any thinking person actually believe that they shouldn’t, or don’t?” (Dr. Joe Mauderly Comments on the NAAQS Review Process March 3, 2006. Available at: [http://yosemite.epa.gov/sab/sabproduct.nsf/WebC/ASAC/Vanessa%20Memo_03-16-06/\\$File/sabso-casac_memo_and_comments.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/WebC/ASAC/Vanessa%20Memo_03-16-06/$File/sabso-casac_memo_and_comments.pdf))

³² Bipartisan Policy Center; 2009:4.

we knew at the time it was inaccurate, that there is a threshold. When we set the standards, we understood that below the standards that we set there would still be health effects.”³³

While the Act left the decision for setting NAAQS to “the judgment of the [EPA] Administrator,” the 1977 amendments required the Administrator to create an “independent scientific review committee,” now known as the Clean Air Scientific Advisory Committee (CASAC) with authority not only to review the scientific criteria developed by EPA but to “recommend to the Administrator any new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate...” (109(d)(2) By inviting the scientific advisors to make normative recommendations regarding what level is appropriate, this language further blurs the distinctions between scientific expertise and policy judgment.³⁴

2.2. EPA

EPA follows a multi-step process when reviewing and setting NAAQS, as shown in Figure 2.³⁵ It begins by developing an Integrated Review Plan that identifies the science and policy issues that will be reviewed during the 5-year assessment. Next, EPA conducts extensive reviews of the available science in what is called an Integrated Science Assessment (ISA). Data on the criteria air pollutants are often extensive, with ISAs running to thousands of pages and including reviews of hundreds or thousands of studies. EPA staff use the results of the ISA to develop a risk and exposure assessment (REA) to evaluate potential risks associated with exposures expected at the existing standard and at alternative standards. To accomplish this, agency staff interprets various studies and data to generate a single concentration-response model to predict health effects at different levels of exposure. EPA’s presentation of the available studies and data necessarily involves judgment about which studies to consider and which to exclude, as well as assumptions about what models best fit the selected data and how to extrapolate between observed and predicted exposures. In recent reviews (e.g., ozone, PM) concentration-response models assume that adverse health effects occur in a linear manner, at exposures down to zero.³⁶

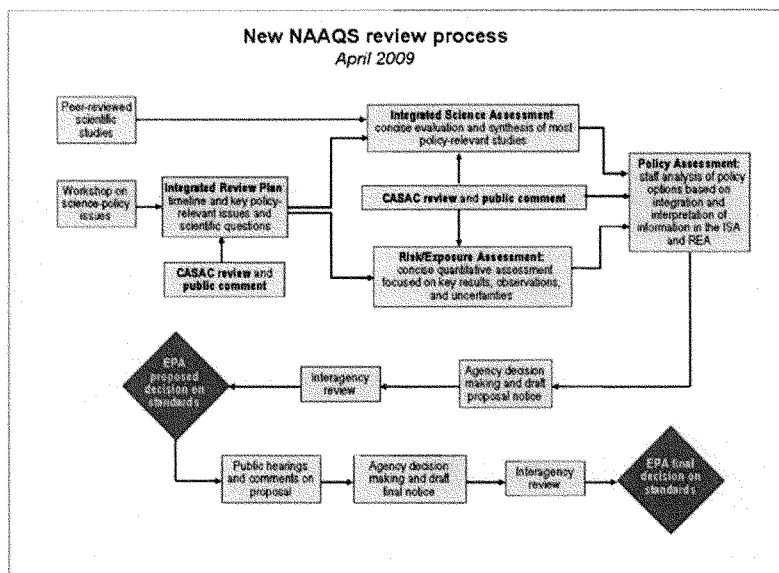
³³ Schoenbrod, D. “Politics and the Principle that Elected Legislators Should Make the Laws.” *Harvard J. Law Public Policy* 2003, 26: 270, citing Clean Air Act Amendments of 1977: Hearings Before the Subcomm. on Env’t Pollution of the Senate Comm. on Env’t and Public Works, 95th Cong. 8 (1977).

³⁴ The statutory role assigned CASAC makes it difficult to implement the Bipartisan Policy Center’s recommendation that, “in general, scientific advisory panels should not be asked to recommend specific regulatory policies.” Bipartisan Policy Center, 2009:17.

³⁵ Craig, E. (EPA Acting Administrator for Air and Radiation). Letter to: Kadeli, L. (Acting Assistant Administrator for Research and Development). 2009 May 21. Process for Reviewing National Ambient Air Quality Standards. Available at: <http://www.epa.gov/ttn/naaqs/pdfs/NAAQSReviewProcessMemo52109.pdf>

³⁶ See final regulations governing PM_{2.5} (Available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-01-15/pdf/2012-30946.pdf>); Nitrogen dioxide (Available at: <http://www.gpo.gov/fdsys/pkg/FR-2010-02-09/html/2010-1990.htm>); and Ozone (Available at: <http://www.gpo.gov/fdsys/pkg/FR-2008-03-27/html/E8-5645.htm>)

Figure 2.



As statistician Louis Anthony Cox observed in a recent public comment on EPA's proposed ozone NAAQS,

EPA's quantitative risk estimate (QRA) provides no legitimate reason to believe that the proposed action is "requisite to protect public health" or that reducing the ozone standard further will cause any public health benefits. The QRA's model-based projections to the contrary are known to rely on mistaken assumptions (for the MSS model) and mistaken interpretations of curve-fitting (for the epidemiological risk assessment in Section 7). Past data on human health before and after reductions in ozone do not reveal any such causal impacts. Given EPA's information and the unquantified model uncertainty that remains, there is no sound technical basis for asserting with confidence, based on the models and analyses in EPA's ozone risk assessment, that an ozone standard of 65 ppb would be any more protective than 70 ppb, or that 80 ppb is less protective than 60 ppb. To the contrary, available data suggest that further reductions in ozone levels will

make no difference to public health, just as recent past reductions in ozone have had no detectable causal impact on improving public health.³⁷

Further, the risk assessment policy judgments that are embedded in these models are not transparent. The findings of the ISA and REA will depend heavily on how the staff decides to answer such questions as what effects are considered “adverse,” the shape of the exposure-response function, and whether observed associations are sufficient to assume causal effects, even in the absence of plausible biological evidence of causality. For example, EPA considers reversible, asymptomatic cellular changes and transient symptomatic effects (such as coughs) to be “adverse,” even when those effects may be similar to risk levels people accept in their daily decisions, like driving, eating, playing, and working.³⁸

A recent report from the Institute of Medicine observed:

Uncertainty is inherent in the scientific information upon which health risk estimates are based. Uncertainties enter the health risk assessment process at every step and can be caused by the potential confounders in observational studies, by extrapolation from animal studies to human studies, by extrapolation from high to low dose exposures, by inter-individual variability, and by modeling the relationships between concentrations, human exposures, and human health responses and evaluating the effect of interventions or risk control options on public health risk.³⁹

The uncertainties inherent in these assessments can be significant. For example, one key assumption that drives estimates of the effects of exposure to fine particles (PM_{2.5}) is that “inhalation of fine particles is causally associated with premature death.”⁴⁰ EPA assumes a causal relationship based on epidemiological evidence of an association between PM concentrations and mortality, however, as all students are taught, correlation does not imply

³⁷ Cox, LA Jr. “Public Interest Comment on the Environmental Protection Agency’s Proposed Rule: National Ambient Air Quality Standards for Ozone.” The George Washington University Regulatory Studies Center. March 17, 2015. <http://regulatorystudies.columbian.gwu.edu/public-comment-national-ambient-air-quality-standards-ozone>

³⁸ See, for example, discussion of health effects in National Ambient Air Quality Standards for Ozone; Proposed Rule. December 17, 2014. (79 FR 75263) “Cox 2015”

³⁹ Board on Population Health and Public Health Practice; Institute of Medicine. *Environmental Decisions in the Face of Uncertainty*, Committee on Decision Making Under Uncertainty, 2013. Available at: http://www.nap.edu/catalog.php?record_id=12568

⁴⁰ Office of Information and Regulatory Affairs. *2012 Report to Congress On the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities*. Washington (DC): Office of Management and Budget, Executive Office of the President; 2013:19. Available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/2012_cb/2012_cost_benefit_report.pdf

causation (*cum hoc non propter hoc*), and EPA cannot identify a biological mechanism to explain the observed correlation. As Dominici, Greenstone & Sunstein observe, “associational approaches to inferring causal relations can be highly sensitive to the choice of the statistical model and set of available covariates that are used to adjust for confounding.”⁴¹ Further, statistical experts raise questions as to whether the correlation EPA claims is real, and present analysis that suggests EPA’s estimates of PM_{2.5} mortalities are a product of model and data choices, rather than a real measured correlation.⁴²

Another key assumption on which EPA’s estimates of adverse effects hinge is that the concentration-response function for fine particles is linear within the range of ambient concentrations under consideration. Both theory and data suggest that thresholds exist below which further reductions in exposure to PM_{2.5} do not yield changes in mortality response, and that one should expect diminishing returns as exposures are reduced to lower and lower levels.⁴³ However, EPA assumes a linear concentration-response impact function that extends to concentrations below background levels.

Based on its assumptions of a causal, linear, no-threshold relationship between PM_{2.5} exposure and premature mortality, EPA quantifies a number of premature mortalities that will be avoided when concentrations of PM_{2.5} decline as a result of regulation. If any of these assumptions are false (in other words, if no association exists, if the relationship is not causal, or if the concentration-response relationship is not linear at low doses), the effects of reducing PM_{2.5} would be significantly less than EPA’s assessments estimate, including zero.

Yet, these uncertainties are not presented in the ranges of risks reported. Cox’s review of EPA’s ozone NAAQS proposed in December 2014 finds:

⁴¹ Dominici, Francesca, Greenstone, Michael, & Sunstein, Cass R. “Particulate Matter Matters.” *Science* Vol 344. April 18, 2014.

⁴² See, e.g., Cox L.A. “Reassessing the human health benefits from cleaner air.” 2012 May;32(5):816-29. Risk Analysis 2012, and Krstić, G. “A reanalysis of fine particulate matter air pollution versus life expectancy in the United States,” *J Air Waste Manag Assoc.* 2013 Feb;63(2):133-5. Cox’s statistical analysis suggests with a greater than 95% probability that no association exists, and that instead, EPA’s results are a product of its choice of models and selected data, rather than a real measured correlation. Krstić’s reanalysis shows that “the statistical significance of the correlation is lost after removing one of the metropolitan areas from the regression analysis, suggesting that the results may not be suitable for a meaningful and reliable inference.”

⁴³ See, for example Texas Commission on Environmental Quality, “PM_{2.5} Standards may be set Lower than Scientifically Justifiable,” noting that “extrapolations [to current exposure levels] can be contrary to the basic principles of toxicology where the biological threshold (a level below which no effect is apparent) is a key concept.” Available at: http://www.tceq.texas.gov/assets/public/comm_exec_pubs/pd/020_2013/Outlook-Mar-2013-x.pdf

EPA has not quantified crucial model uncertainties. Therefore, confidence intervals calculated assuming that the models used are correct are misleadingly narrow and EPA has provided policy makers with no basis for confident predictions about how different changes in the ozone standard would probably affect public health.⁴⁴

One former EPA science advisor called for “a more explicit characterization of uncertainty in estimates of causality and exposure-response relationships ... for both primary and secondary standards,” noting:

At present, assessments of “uncertainty” are almost completely focused on the mathematical uncertainty of effects estimates (i.e., confidence intervals on measurements of exposures and effects). This is important of course, but I would like to see a more rigorous discussion of “certainty” in a broader sense. For example, how do the magnitudes of health effects of air pollution rank in comparison to other voluntary and involuntary health risks? Because air pollutants seldom, if ever, exert novel effects, what portion of the total public health effect is plausibly attributable to a pollutant (or to pollution)? What do we know about the relative benefits, and cost-benefit relationships, of different approaches to reducing health burdens that are exerted in part by air pollution? I care not that these issues might not fall within many folks’ definition of “scientific information,” or that EPA is not supposed to take cost into account in promulgating standards (does any thinking person actually believe that they shouldn’t, or don’t?). We delude ourselves and miss opportunities to inform policy makers and promote a rational public understanding of risk if we continue to view the “uncertainty” issue as solely one of statistical methodology and data quality, while advocating for the special importance of the particular effects ... by which we make our living.⁴⁵

These uncertainties are further hidden from policy makers when, after the ISA and REA are completed, EPA staff prepares a Policy Assessment (formerly called the Staff Paper) that “bridges the gap” between the ISA and REA, and develops a set of policy options to present to the Administrator. The Policy Assessment “presents staff conclusions regarding the adequacy of the current suite of standards as well as potential alternative standards for [the Administrator’s]

⁴⁴ Cox, 2015

⁴⁵ Mauderly J. “Comments on the NAAQS Review Process,” March 3, 2006. Available at: [http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/Vanessa%20Memo_03-16-06/\\$File/sabso-casac_memo_and_comments.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/Vanessa%20Memo_03-16-06/$File/sabso-casac_memo_and_comments.pdf)

consideration.”⁴⁶ This presentation of staff’s judgment (informed by CASAC) regarding what is “requisite to protect public health” further blurs the lines between science and policy judgments.⁴⁷ The Policy Assessment presents policy options framed with vague but portentous language, such as “the weight of the evidence” and “a consensus among scientific advisors.” Uncertainty at lower levels of exposure is discussed vaguely to justify setting levels greater than zero.⁴⁸ As a result, the policy options presented constrain the ultimate decision of the Administrator, who is the accountable decision maker under the Clean Air Act.

For example, the Policy Assessment prepared for the fine particle standards set in December 2012 states:

Taking into account both evidence-based and risk-based considerations, staff concludes that consideration should be given to revising the current annual PM_{2.5} standard level of 15 µg/m³ to a level within the range of 13 to 11 µg/m³. Staff further concludes that the evidence most strongly supports consideration of an alternative annual standard level in the range of 12 to 11 µg/m³.⁴⁹

EPA staff prepares yet another document, a Regulatory Impact Analysis (RIA), and publicly releases it concurrently with proposed and final determinations. RIAs are required by executive order to “assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating.”⁵⁰ This document is not depicted on the decision diagram, and EPA is explicit that “the RIA is done for informational purposes only, and the final decisions on the NAAQS are not in any way based on consideration of the information or analyses in the RIA.” The results of the RIA feature prominently in EPA press releases, however. For the recent (December 2012) PM_{2.5} NAAQS, EPA announced that meeting the Administrator’s selected

⁴⁶ United States Environmental Protection Agency, Office of Air and Radiation. Policy Assessment for the Review of Particulate Matter National Ambient Air Quality Standards, Second External Review Draft. Washington (DC): United States Environmental Protection Agency; 2010 June. Available at:

<http://www.epa.gov/ttnaaqs/standards/pm/data/20100630seconddraftpmpa.pdf>

⁴⁷ A committee charged with identifying PM research needs did not look at the adequacy of scientific basis for a NAAQS standard “because the process of setting such standards also involves legal requirements and policy choices that the present committee was neither charged nor constituted to address.” Committee on Research Priorities for Airborne Particulate Matter, National Research Council. Research Priorities for Airborne Particulate Matter. Washington (DC): National Academic Press; 1998.

⁴⁸ For example, the December 2014 ozone proposal argues that “setting a standard below 0.065 ppm, down to 0.060 ppm, would inappropriately place very little weight on the uncertainties in the health effects evidence and exposure/risk information.” 79 FR 65236

⁴⁹ Office of Air and Planning. Policy Assessment for the Review of the Particulate Matter National Ambient Air Quality Standards. United States Environmental Protection Agency; 2011. Available at: <http://www.epa.gov/ttnaaqs/standards/pm/data/20110419pmpafinal.pdf>

⁵⁰ Executive Order 12866, Section 1(a). 1993

standard of 12.0 $\mu\text{g}/\text{m}^3$ standard would avoid between 460 and 1,000 premature deaths per year. However, the RIA also indicated that further tightening—going from a standard of 12 $\mu\text{g}/\text{m}^3$ to 11 $\mu\text{g}/\text{m}^3$ —would yield additional life savings of 1,040 to 2,300 mortalities per year.

Given that these two data points suggest the incremental life savings associated with a reduction from 12 $\mu\text{g}/\text{m}^3$ to 11 $\mu\text{g}/\text{m}^3$ are greater than those associated with a reduction from 13 $\mu\text{g}/\text{m}^3$ to 12 $\mu\text{g}/\text{m}^3$, it is curious that the Policy Assessment did not recommend, or at least examine, standards below 11 $\mu\text{g}/\text{m}^3$. Neither the Policy Assessment nor RIA explains this, nor the Administrator's decision to set a standard of 12 $\mu\text{g}/\text{m}^3$, which these documents suggest leave between 580 and 1,300 lives unprotected.

Instead the RIA justifies the standards as follows:

This action provides increased protection for children, older adults, persons with pre-existing heart and lung disease, and other at-risk populations against an array of PM_{2.5}-related adverse health effects that include premature mortality, increased hospital admissions and emergency department visits, and development of chronic respiratory disease. ... The revised suite of PM_{2.5} standards also reflects consideration of a quantitative risk assessment that estimates public health risks likely to remain upon just meeting the current and various alternative standards. Based on this information, the Administrator concludes that the current primary PM_{2.5} standards are not requisite to protect public health with an adequate margin of safety, as required by the Clean Air Act, and that these revisions are warranted to provide the appropriate degree of increased public health protection.

As a former senior EPA air office official observed about the 1997 standard:

Nuance and uncertainty were also lacking in EPA's public communications after proposal. The agency's sound bite was that the science demanded the revisions. Although it was true that EPA's assessment of the science found a need to tighten the standards, the *particular* standards proposed were obviously not wholly determined by science.⁵¹

The statutory language forces EPA staff to present vague justifications that are careful not to express considerations of economic tradeoffs. Yet, because there is no threshold below which models do not predict health effects, short of eliminating these criteria pollutants altogether, science alone cannot identify what standard along the modeled linear no-threshold dose-response function would be "requisite to protect public health." And yet, all involved regularly participate

⁵¹ Bachmann, 2007: 687

in a charade in which EPA sets standards at non-zero levels and justifies the decision based solely on arguments that are characterized as strictly scientific.

2.3. CASAC

CASAC is a seven-member committee the Clean Air Act established “to provide advice and recommendations to EPA.”⁵² Members generally serve for two consecutive three-year terms, and meet 12 to 15 times a year. Their expertise is often supplemented by panels of 20 or more experts on the health and environmental effects of the specific pollutants that are under review. As Figure 2 shows, these CASAC panels are involved at all stages of the NAAQS development process.

As recent reports from the Keystone Center and BPC have observed, scientific advisory panels can provide valuable input to agency decision making. However, they caution that “in general, scientific advisory panels should not be asked to recommend specific regulatory policies”⁵³ or “to answer questions that go beyond matters of scientific judgment.”⁵⁴ As noted above, the Clean Air Act authorizes CASAC to recommend “new national ambient air quality standards and revisions of existing criteria and standards as may be appropriate.” The Act does not require CASAC’s *approval* of the Administrator’s policy choice however, and a Congressional Research Service (CRS) review of the history of CASAC observed that, until recently, committees eschewed the role of approver:

CASAC panels have a nearly 30-year history of working quietly in the background, advising the agency’s staff on NAAQS reviews, and issuing what were called “closure letters” on the agency documents that summarize the science and the policy options behind the NAAQS. Closure letters have been used by CASAC panels to indicate a consensus that the agency staff’s work provides an adequate scientific basis for regulatory decisions. The science and policy documents, written by EPA staff, generally have gone through several iterations before the scientists were satisfied, but, with the issuance of a closure letter,

⁵² See EPA Science Advisory Board. United States Environmental Protection Agency Charter. Environmental Available at: <http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/currentcharter?OpenDocument>

⁵³ Bipartisan Policy Center; 2009: 5.

⁵⁴ The Keystone Center. Research Integrity Roundtable. *Improving the Use of Science in Regulatory Decision Making: Dealing with Conflict of Interest and Bias in Scientific Advisory Panels, and Improving Systematic Scientific Reviews*. Washington (DC): The Keystone Center; 2012: 8. Available at: <https://www.keystone.org/images/keystone-center/sppdocuments/Health/Research%20Integrity%20Roundtable%20Report.pdf>

CASAC has in past years removed itself from the process, leaving the formal proposal and final choice of standards to the Administrator.⁵⁵

This CASAC role was consistent with Weinberg's recommendation in his landmark paper on "trans-science," in which he observed:

Though the scientist cannot provide definite answers to trans-scientific questions any more than can the lawyer, the politician or a member of the lay public, he does have one crucially important role: to make clear where science ends and trans-science begins.⁵⁶

Recent Committees, however have been very vocal in recommending specific regulatory options, and criticizing administrators who deviate from their recommendations. In 2006, after the EPA Administrator issued standards outside the range recommended by CASAC, the committee took the unprecedented action of writing to the Administrator that the standard "does not provide an 'adequate margin of safety ... requisite to protect the public health' (as required by the Clean Air Act)"⁵⁷

In 2008, CASAC's ozone review panel stated in a letter to EPA that its members:

*do not endorse the new primary ozone standard as being sufficiently protective of public health. The CASAC — as the Agency's statutorily-established science advisory committee for advising you on the national ambient air quality standards — unanimously recommended decreasing the primary standard to within the range of 0.060–0.070 ppm. It is the Committee's consensus scientific opinion that your decision to set the primary ozone standard above this range fails to satisfy the explicit stipulations of the Clean Air Act that you ensure an adequate margin of safety for all individuals, including sensitive populations.*⁵⁸ (emphasis in original)

⁵⁵ McCarthy, James. E. "Air Quality Standards and Sound Science: What Role for CASAC?" CRS Report RL33807, January 19, 2007:2. Available at: <http://www.policyarchive.org/handle/10207/bitstreams/3076.pdf>

⁵⁶ Weinberg, Alvin M. 1972,.

⁵⁷ Letter of Rogene Henderson et al. (of the Clean Air Scientific Advisory Committee) Letter to: to Hon. Stephen L. Johnson EPA Administrator) regarding the PM NAAQS, Sep 2006. Available at: <http://www.epa.gov/sab/pdf/casac-ltr-06-003.pdf>. Italics in original.

⁵⁸ Letter of Rogene Henderson et al. of the Clean Air Scientific Advisory Committee to Hon. Stephen L. Johnson, EPA Administrator, April 7, 2008, Available at: [http://yosemite.epa.gov/sab/sabproduct.nsf/264cb1227d55e02c85257402007446a4/4AF8764324331288852574250069E494/\\$File/EPA-CASAC-08-009-unsigned.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/264cb1227d55e02c85257402007446a4/4AF8764324331288852574250069E494/$File/EPA-CASAC-08-009-unsigned.pdf)

The CRS report observes that CASAC's recent advocacy deviates from its past practice, when it refrained from objecting to policy decisions that differed from its recommendations. It points to two examples where EPA administrators took no action to revise standards, despite staff and CASAC recommendations that the standards be tightened: in 1990, with regard to the lead NAAQS, and in 1996, with regard to the sulfur dioxide NAAQS. CASAC did not object in either case.⁵⁹ In a more recent case, CASAC did not publicly object to Administrator Lisa Jackson's decision not to revise the primary standard for coarse particles (PM₁₀) in 2012, despite its conclusion that "it is clear that the current PM₁₀ standard is not adequate to protect the public health,"⁶⁰ and recommendation "that the primary standard for PM₁₀ should be revised downwards."⁶¹

The more activist stance of recent committees may cross the line between science and policy. In response to an EPA workgroup effort to improve the NAAQS process, several former CASAC members expressed concerns about CASAC's ability to distinguish between science and policy recommendations.

Former CASAC member, Dr. Ellis Cowling, cautioned:

The responsibility of scientists, engineers, and policy analysts is to understand and clearly communicate the scientific facts and uncertainties and to describe expected outcomes objectively. Deciding what to do involves questions of societal values where scientists, engineers, and policy analysts have no special authority.⁶²

Former chairman, Bernard D. Goldstein, M.D., reflected on his experience:

I found a sense among several CASAC members that the CASAC is responsible for approving the proposed standards rather than giving advice and recommendations. The Agency should make clear to CASAC what they require in terms of scientific advice and what they consider to be policy issues, on which they do not need advice. The line between science and policy is not always

⁵⁹ McCarthy, James. E. 2007:9.

⁶⁰ Dr. Jonathan M. Samet et al. letter of the Clean Air Scientific Advisory Committee to Hon. Lisa Jackson, EPA Administrator. May 17, 2010. EPA-CASAC-10-011

⁶¹ Dr. Jonathan M. Samet et al. letter of the Clean Air Scientific Advisory Committee to Hon. Lisa Jackson, EPA Administrator. September 10, 2010. EPA-CASAC-10-015

⁶² Cowling, Ellis. "Comments on the NAAQS Review Process," March 3, 2006. Available at: [http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/Vanessa%20Memo_03-16-06/\\$File/sabso-casac_memo_and_comments.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/Vanessa%20Memo_03-16-06/$File/sabso-casac_memo_and_comments.pdf)

apparent, and this difference should be made clear in the charge questions given to CASAC.⁶³

Dr. George T. Wolff made a similar point, observing:

The selection of a particular level for a standard is a policy judgment. CASAC's job is to insure that the range, form and averaging time recommended in the Staff Paper have a scientific basis. In questioning the recommendations in the January 17, 2006 NPRM, CASAC has clearly overstepped their boundaries and ventured into the policy arena.⁶⁴

Former CASAC chairman, Dr. Joe Mauderly, observed:

Neither scientists nor policy makers want to draw the line [between science and policy], or to define it or admit to it. CASAC meetings are rife with discussions about how its pronouncements will affect policy, and scientist advocates (on CASAC and its panels, as well as others) game the system to achieve their ideological policy goals. When EPA proposes or promulgates standards, it is reluctant to state clearly how science and policy enter into the decision – it wants to portray that all is based on science. These behaviors are absolutely understandable – most scientists are convinced that they know what's best for the country, and EPA Administrators don't want to admit to any motive other than the "best science."⁶⁵

This blurring of the lines between science and policy is illustrated in CASAC deliberations on the 2007 lead NAAQS. Members objected to the standard the Administrator was considering because "it wouldn't create any pressure on any person producing lead in the environment today from reducing because it doesn't leave any more exceedances than the current standard."⁶⁶ They presented various non-science arguments in support of their preferred, more stringent, policy

⁶³ Goldstein, Bernard, M.D. "Comments on the NAAQS Review Process." March 3, 2006. Available at: [http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/Vanessa%20Memo_03-16-06/\\$File/sabso-casac_memo_and_comments.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/Vanessa%20Memo_03-16-06/$File/sabso-casac_memo_and_comments.pdf)

⁶⁴ Wolff, George T. "Comments on the NAAQS Review Process," March 3, 2006. Available at: [http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/Vanessa%20Memo_03-16-06/\\$File/sabso-casac_memo_and_comments.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/Vanessa%20Memo_03-16-06/$File/sabso-casac_memo_and_comments.pdf)

⁶⁵ Mauderly, J. "Comments on the NAAQS Review Process." March 3, 2006. Available at: [http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/Vanessa%20Memo_03-16-06/\\$File/sabso-casac_memo_and_comments.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/Vanessa%20Memo_03-16-06/$File/sabso-casac_memo_and_comments.pdf)

⁶⁶ US EPA CASAC Lead Review Panel Public Advisory Meeting 2/7/07 CCR # 14610-13 page 15

option, including the “need to regulate it at a level that causes public attention to come to the problem,” and that “causes the most severe polluters to have to put in additional controls...”⁶⁷

The Committee discussions appear to suffer from the symptoms identified in the organizational behavior literature regarding group behavior, including

close-mindedness, involving a collective effort “to rationalize” so as to discount warnings or information that might lead to reconsideration, and stereotyped views of enemies, as too evil to warrant efforts at negotiation or “too weak and stupid to counter” the group’s...choices.⁶⁸

Transcripts of CASAC’s 2007 meetings on the lead NAAQS decisions, for example, reveal that its members have few real disagreements with each other or with EPA staff, so the committee lacked the value of independent analysis and challenge that is so essential to the scientific method. The discussions exhibit the “asymmetrical trust” symptomatic of insular group dynamics that perpetuates an “us vs. them” mindset.⁶⁹ While committee members treat each other and EPA staff, with whom they often have a close working relationship, with respect, their comments reflect a “stereotyped view of enemies,” including policy officials, other agency staff, and the public.⁷⁰ For example, committee members objected strongly to providing the broader public an opportunity to comment on issues not preapproved by the committee, and members expressed the view that anyone not part of the committee must have a conflict of interest.⁷¹

Former CASAC chair George Wolff raised concerns that EPA’s selection of panel members has exacerbated this problem. He noted several differences between the panel reviewing the 1997 fine particle NAAQS and the 2006 standard, including a change in the composition of the panels:

In the 1994-96 review, there were a number of Panel members who were skeptical that the epidemiology studies demonstrated cause and effect including one biostatistician and one epidemiologist who were not authors of the studies that found statistical links between PM and health endpoints. As a result, the Panel expressed “a diversity of opinion.”

When the new Panel was formed, most of the Panel members who supported a causal role in 1996 were invited back to be on the new panel. Most of the skeptics

⁶⁷ US EPA CASAC Lead Review Panel Public Advisory Meeting 2/7/07 CCR # 14610-13 pages 15-16

⁶⁸ Sunstein, Cass. *Going to Extremes: How Like Minds Unite and Divide*. New York: Oxford University; 2009:86.

⁶⁹ Sunstein, 2009.

⁷⁰ US EPA PUBLIC MEETING 12/12/07 CCR# 15740-1 Page 145

⁷¹ US EPA PUBLIC MEETING 12/12/07 CCR# 15740-1 Page 33. Members objected to seeking public comment on issues because that put commenters “on an equal basis with the CASAC,” and constituted “taking a group that has a clear conflict of interest and treating them as though they are equal to CASAC.”

were not. Instead they were replaced by individuals that, on the balance, were more supportive of the Agency's position. In fact, by the time the Panel concluded the review, seven out of 22 members had been authors of papers that purport causality. No epidemiologist or statistician who questioned causality was a member of the Panel. This lack of balance on the Panel predetermined the outcome of the review.⁷²

Former CASAC chair Roger McClellan expressed concern that CASAC panel "membership has been excessively dominated by scientists that to a large extent have developed the scientific information contained in the documents [they are charged with reviewing]," noting that "in some cases, the individuals have already offered opinions as to how the science should be used to set NAAQS, a more stringent standard based on their science."⁷³ According to a Congressional investigation, 16 of the 20 members of the CASAC panel charged with reviewing the science in support of the 2015 ozone NAAQS had conducted studies they were supposed to evaluate, and 14 of the 20 members had been principal or co-investigators for EPA grants totaling more than \$120 million.⁷⁴

The blurring of the line between science and policy is also evident in the treatment of uncertainty and risk communication. Although the members of CASAC recognize the uncertainty inherent in supporting analyses, the drive for a narrow range of policy options may limit their willingness to quantify the full uncertainty range or to explore the quantitative implications of alternative science policy choices. For example, the 2007 lead NAAQS transcript reveals that CASAC members were initially critical of an EPA method for measuring health effects on the grounds that it was oversimplified and didn't rely on current data and modeling techniques. When EPA staff pointed out that this simplified method would more likely lead policy makers to a level preferred by CASAC than the more sophisticated method, CASAC members dropped their objections.⁷⁵

The strongly-worded letter objecting to the Administrator's policy decision on the 2006 PM_{2.5} NAAQS, states that, "while there is uncertainty associated with the risk assessment for the PM_{2.5} standard, this very uncertainty suggests a need for a prudent approach to providing an adequate margin of safety."⁷⁶

⁷² Wolff, 2006.

⁷³ Committee on Science, Space, and Technology hearing, "Quality Science for Quality Air," 112th Cong., 1st sess, October 4, 2011. <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg70587/html/CHRG-112hhrg70587.htm>

⁷⁴ Lamar Smith, Chairman Committee on Science, Space, and Technology letter to EPA Administrator letter to Gina McCarthy. March 19, 2014. <http://science.house.gov/sites/republicans.science.house.gov/files/documents/03-19-2014%20Smith%20to%20Administrator%20McCarthy.pdf>

⁷⁵ US EPA PUBLIC MEETING 12/12/07 CCR# 15740-1 Page 67

⁷⁶ CASAC letter to EPA Administrator Johnson, September 29, 2006. EPA-CASAC-LTR-06-003

This assertion that uncertainty demands a “prudent” policy decision stands in contrast to the statement of former chairman, Bernard Goldstein, who told EPA:

How one deals with the uncertainties is a policy issue. One can say that a lot of uncertainty suggests being more conservative to be sure we are “safe.” Another policy might be that a large amount of uncertainties means that we cannot select appropriate levels until we have more information. In any case, the amount of uncertainty should be fully addressed and central estimates should be given as well as the upper and lower confidence limits. Again, the policy decisions made should be explicit and clearly stated in public.⁷⁷

As this discussion has shown, CASAC members’ views of their role has evolved over time to be increasingly involved in the policy decision as to the level at which the standard should be set. This may be due, in part, to the individuals EPA staff select to serve on the committee and panels,⁷⁸ and the charge EPA gives them.⁷⁹ As discussed further below, members’ views constrain policy officials and the courts, and influence public opinion. When differences of opinion about policies are cast as scientific disagreements, accusations of politicized science arise. However, as the BPC noted, “some disputes over the ‘politicization’ of science actually arise over differences about policy choices that science can inform, but not determine.”⁸⁰ In other words, they may reflect scientization of policy rather than politicization of science.

2.4. Policy Officials

Under the Clean Air Act, it is the EPA Administrator (and thus the president at whose pleasure she serves) who is ultimately responsible for issuing primary NAAQS, “the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health.”⁸¹ Similarly the Act requires the Administrator to set secondary NAAQS at a level which, in her judgment, “is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air.”⁸² Though EPA staff prepares a

⁷⁷ Goldstein, 2006.

⁷⁸ Wolff, 2006.

⁷⁹ As former CASAC chair Bernard D. Goldstein, M.D. observed, EPA “should make clear to CASAC what they require in terms of scientific advice and what they consider to be policy issues, on which they do not need advice.” Comments on the NAAQS Review Process March 3, 2006.

⁸⁰ Bipartisan Policy Center; 2009.

⁸¹ 42 USC § 7409(b)(1)

⁸² 42 USC § 7409(b)(2)

regulatory impact analysis, including an assessment of the likely costs and benefits of achieving different standards, the Administrator does not consider it, and staff does not present it to her.⁸³

In choosing the level of the standard, the Administrator faces pressure from EPA staff and CASAC members, as well as outside groups, including state and local governments (which are ultimately responsible for establishing the implementation plans that will enable their areas to attain the standard), potentially regulated parties, non-governmental organizations (NGOs), and Congress. In addition, other Administration officials (who often are responsible for implementing competing policy goals and may also be hearing from constituencies outside the government) may seek to influence the Administrator's determination.

The Administrator deviates from the recommendations of the Policy Assessment and CASAC at her peril.⁸⁴ If she makes a decision outside of the box presented to her, the Administrator runs the risk that NGOs will file suit to overturn her decision (possibly with support from EPA staff, who may even work with attorneys at the Justice Department's Environment and Natural Resources Division to make sure that the Administrator loses the lawsuit).⁸⁵ Public disagreements also put policy officials at a public relations disadvantage, when exercising policy judgment is characterized as going against science.⁸⁶ Both Presidents Obama and Bush were accused of politicizing science when they chose not to regulate ozone at the levels recommended by CASAC and the staff Policy Assessment.⁸⁷

Not only does the current practice discourage policy makers from setting standards higher than those recommended by staff, but lower as well. At one point in the development of the 2008 lead NAAQS, consideration was given to seeking public comment on whether zero was appropriate as the lower end of the range at which to set the standard. Given the lack of a threshold in health effects, and CASAC's unanimous and vocal opinion that lead remained a very serious public health risk, some policy officials questioned the justification for setting any standard above zero.⁸⁸ Available data and modeling made it difficult for the Administrator to conclude that a

⁸³ According to the Regulatory Impact Analysis conducted in association with the final particulate matter standard set in December 2012, "[i]n NAAQS rulemaking, the RIA is done for informational purposes only, and the final decisions on the NAAQS in this rulemaking are not in any way based on consideration of the information or analyses in the RIA."

⁸⁴ CASAC letter to EPA Administrator Johnson, September 29, 2006. EPA-CASAC-LTR-06-003

⁸⁵ Bell, Larry. "EPA's Secret And Costly 'Sue And Settle' Collusion With Environmental Organizations." *Forbes*. February 17, 2013. <http://www.forbes.com/sites/larrybell/2013/02/17/epas-secret-and-costly-sue-and-settle-collusion-with-environmental-organizations/>

⁸⁶ See, for example, Union of Concerned Scientists blog, "EPA Air Pollution Decision Threatens Public Health: Science Disregarded, Misrepresented on Particulate Matter Standard." http://www.ucsusa.org/scientific_integrity/abuses_of_science/epa-air-pollution-decision.html

⁸⁷ See for example: http://switchboard.nrdc.org/blogs/jwalke/the_president_sabotages_clean.html

⁸⁸ Author's personal experience in NAAQS discussions as administrator of OIRA.

lead ambient air quality standard of 0.15 ug/m³ was “requisite” to protect public health with an “adequate margin of safety,” but 0.5 ug/m³ or 0 ug/m³ was not. EPA Air Office staff (perhaps correctly) perceived this as an effort to expose the inherent contradictions in the NAAQS provisions of the Clean Air Act, and they strongly objected to it. In the face of staff opposition, Administrator Johnson chose not to present the wider range for public comment. It is much safer for policy officials to defer to the options recommended by staff and CASAC.⁸⁹

In 2008, during the interagency review of EPA’s ozone NAAQS, disagreement over the form of the secondary “welfare” standard was so contentious that President Bush ultimately had to step in to resolve it.⁹⁰ Deliberations within the executive are generally not public, but in this case the Administrator was very reluctant to select a form different from that recommended by staff.⁹¹ Out of respect for his concern, correspondence between the OIRA Administrator and Deputy Administrator of EPA explaining their respective positions was shared publicly on the agencies’ websites,⁹² and the final preamble to the rule acknowledged the disagreement and that it was the President who concluded what the appropriate form of the standard should be.⁹³

2.5. States

States have a great interest in the level of the NAAQS. Under the Act, EPA establishes the allowable concentration of each pollutant in the ambient air, but the burden falls on states to develop implementation plans that achieve those levels. Under the statute, areas not in attainment with the standard face restrictions on economic growth.⁹⁴ If a state fails to develop a plan that meets with EPA’s approval, the agency may impose an even more draconian (and possibly punitive) Federal Implementation Plan; the federal government can also withhold federal highway funding from states chronically out of attainment, although it has not done so yet. By imposing the obligation of NAAQS attainment on the states, EPA effectively commandeers, not only the considerable state resources that are needed to carry out the program, but also the much broader array of police powers that states enjoy. State Implementation Plans may include land

⁸⁹ Mauderly, 2006, noting “most scientists are convinced that they know what’s best for the country, and EPA Administrators don’t want to admit to any motive other than the ‘best science.’”

⁹⁰ In the rarely-used section 7 of E.O. 12866, “conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President.”

⁹¹ Author’s personal experience as OIRA Administrator.

⁹² See memo from Susan Dudley to Steve Johnson on OIRA’s RegInfo site:

http://www.reginfo.gov/public/postreview/Steve_Johnson_Letter_on_NAAQS_final_3-13-08_2.pdf.

⁹³ Environmental Protection Agency. “National Ambient Air Quality Standards for Ozone.” 73 FR 16497. <http://www.gpo.gov/fdsys/pkg/FR-2008-03-27/pdf/E8-5645.pdf>

⁹⁴ Greenstone, M., List J.A., Syverson, C. “The Effects of Environmental Regulation on the Competitiveness of U.S. Manufacturing.” MIT Center for Energy and Environmental Policy Research working paper. CEEPR WP 2012-013; 2012.

use controls and other regulatory options that are not available to EPA under the Constitution, let alone the Clean Air Act.

And yet, it may not be enough. Since the EPA Administrator cannot consider the feasibility of achieving a standard when revising it, the NAAQS for several criteria pollutants have put large geographic areas out of attainment, particularly the more densely populated urban areas of the Northeast and Pacific coast, with no realistic options for successful implementation. Los Angeles and surrounding areas, for example, cannot comply with the 0.08 ppm ozone NAAQS set in the 1990s, to say nothing of the tighter 0.075 ppm standards established in 2008 or the even tighter (0.060 to 0.070 ppm standards) being considered⁹⁵ at the time of this writing in 2015.⁹⁶

Ironically, the states unable to comply with current standards are typically more supportive of stricter standards than the states that are in attainment. Eight of the fifteen states that filed comments that supported tightening the ozone NAAQS last set in 2008 were unable to meet the existing standard, and would certainly not be able to comply with a tighter standard. Not only do non-attainment states file comments on proposed standards, but several recently threatened to sue EPA for failure to issue more stringent standards.⁹⁷ In contrast, of the six states that filed comments that opposed tightening the ozone NAAQS, four were in “maintenance,” meaning they had recently achieved compliance.

This may not be as surprising as it initially appears. Nonattainment areas have trouble attracting new businesses, and their citizens suffer (or move) when potential job-creating industries settle in other states. Greenstone et al have quantified the economic losses associated with nonattainment status, finding that

total factor productivity (TFP) among plants that emit the targeted pollutants... declines by 4.8 percent for polluting plants in nonattainment counties. This corresponds to an annual economic cost from the regulation of manufacturing plants of roughly \$21 billion in 2010 dollars. This translates into a loss of more than \$450 billion over the studied period [1972 to 1993].⁹⁸

From the perspective of nonattainment areas, strict standards that throw areas in other states out of attainment “level the playing field.” Areas that are already out of attainment have little to lose from stricter standards, but they gain relative to competing states which will have nonattainment

⁹⁵ Environmental Protection Agency. “National Ambient Air Quality Standards for Ozone.” Proposed Rule. 79 FR 75233

⁹⁶ Environmental Protection Agency.

<http://www.epa.gov/groundlevelozone/designations/2008standards/final/finalmap.htm>

⁹⁷ http://www.epa.gov/ttn/naaqs/standards/ozone/data/ENV_DEFENSE-650358-v1-Ozone_NAAQS_decision.pdf

⁹⁸ Greenstone & Syverson, 2012.

conditions imposed on them. Even though parts of California have been unable to meet the ozone NAAQS set in the 1990s, California legislators were the most vocal proponents of yet more stringent ozone standards in 2008, accusing EPA of considering factors other than public health in setting the NAAQS.⁹⁹

Absent a federal mandate, states would be expected to compete with each other in providing environmental quality, as well as economic prosperity. State officials know that voters demand environmental quality, and they also know that it affects property values – which in turn affect the state tax base, including funding for local governments and school districts. The overlay of mandatory federal NAAQS, however, suppresses and redirects this virtuous interstate competition. EPA's oversight of NAAQS attainment acts in much the same way that economic regulation affects an otherwise competitive industry.¹⁰⁰ Instead of competing in the provision of air quality, states may be motivated to direct their energies to lobbying the regulator, seeking lenient treatment for themselves while advocating economically stifling restrictions on their competitors. State politicians present themselves to the voters as high-minded, if ineffectual, champions of environmental quality.¹⁰¹

2.6. Courts

As noted earlier, the United States Supreme Court confirmed EPA's statutory interpretation that it cannot consider costs when setting the NAAQS.¹⁰² EPA notes, however, that the Act "does not require the Administrator to establish a primary NAAQS at a zero-risk level or at background concentration levels, *see Lead Industries Ass'n v. EPA*, 647 F.2d at 1156 n.51, but rather at a level that reduces risk sufficiently so as to protect public health with an adequate margin of safety."¹⁰³

States supporting more stringent standards are joined by NGOs such as the American Lung Association and the Natural Resources Defense Council in seeking a remand of EPA standards on the grounds that they are not adequately protective according to statutory criteria.¹⁰⁴ States

⁹⁹ <http://online.wsj.com/article/SB121115921730002453.html>

¹⁰⁰ See discussion regarding "presumption against economic regulation" in OMB Circular A-4, "Regulatory Analysis." Available at: <http://www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a004/a-4.pdf>

¹⁰¹ This behavior is consistent with economic theory regarding regulation, particularly the colorfully named "bootlegger and Baptist" theory. Smith, Adam, Yandle, Bruce. *Bootleggers and Baptists: How Economic Forces and Moral Persuasion Interact to Shape Regulatory Politics*. Cato Institute. 2014.

¹⁰² *Whitman v. American Trucking Associations*, 531 U.S. 457, 465–472, 475–76 (2001)

¹⁰³ National Ambient Air Quality Standards for Particulate Matter; Final Rule. January 15, 2013. Available at: <http://www.gpo.gov/fdsys/pkg/FR-2013-01-15/pdf/2012-30946.pdf>

¹⁰⁴ See, for example, OPENING BRIEF OF STATE PETITIONERS in STATE OF MISSISSIPPI, et al v. EPA. USCA Case #08-1204 Document #1369352 Filed: 04/17/2012, arguing that EPA's 2008 ozone NAAQS be remanded "on grounds that the primary NAAQS does not protect public health with an adequate margin of safety"

supporting less stringent standards sue EPA seeking to have NAAQS vacated because the Agency did not establish that the standards are requisite to protect health and welfare under the meaning of the Act. These states are supported by industry litigants (such as the U.S. Chamber of Commerce, the Utility Air Regulatory Group, and the National Association of Home Builders).¹⁰⁵ Given the statutory construction, none of the litigants openly express policy arguments for preferring one standard over another, but rather they couch their legal arguments in terms of science – highlighting differences between CASAC’s recommended levels and the Administrator’s choice, and debating what science is needed to determine what levels are “requisite” to protect public health and welfare, and what qualifies as an “adequate margin of safety.”¹⁰⁶

Lower courts also help enforce the Act’s requirement for reviews of the standards every five years. In response to litigation over missed statutory deadlines, the government will enter into consent decrees that impose judicial deadlines for issuing standards.¹⁰⁷ Particularly given the steps involved in preparing the regulatory record in NAAQS proceedings, these deadlines constrain the opportunity for meaningful public consultation and interagency review.¹⁰⁸ EPA often submits draft regulations to OIRA for interagency review just days before such deadlines.¹⁰⁹

Even as the courts drive the NAAQS process forward and enforce the Clean Air Act’s procedural requirements, they avoid questioning anything in the administrative record that is characterized as science. This understandable deference to agency fact-finding has a curious result: it tends to limit the EPA Administrator’s ability to exercise the policy discretion that the Congress has entrusted to her. If she makes a policy decision that conflicts with the policy preferences of EPA

and the secondary NAAQS does not protect public welfare, as required under the Act”; and PROOF BRIEF FOR ENVIRONMENTAL PETITIONERS in STATE OF MISSISSIPPI, et al v. EPA. USCA Case #08-1204 Document #1369354 Filed: 04/17/2012.

¹⁰⁵ See, for example, JOINT OPENING BRIEF OF PETITIONER STATE OF MISSISSIPPI AND INDUSTRY PETITIONERS in STATE OF MISSISSIPPI, et al v. EPA. USCA Case #08-1204 Document #1369355 Filed: 04/17/2012.

¹⁰⁶ Bachmann notes that “in the pre-proposal period, [interest] groups tried to influence the scientific basis for EPA’s decisions,” while “during the post-proposal period, the emphasis shifted to providing Congress, local elected officials, the media, and the public with ‘spin’ on the science... with results distilled to the ‘sound bite.’” Bachmann 2007: 687.

¹⁰⁷ For example, EPA faces a judicial deadline to issue final ozone NAAQS by October 15, 2015. <http://www.epa.gov/ttn/naaqs/standards/ozone/data/201404ozonenaqsorder.pdf>

¹⁰⁸ Fraas, Arthur. “Observations on OIRA’s Policies and Procedures.” *Administrative Law Review* Vol. 63, Special Edition: OIRA Thirtieth Anniversary Conference (2011), p. 86.

¹⁰⁹ Since the mid-1990s, the average interagency review time for NAAQS rules subject to deadlines was less than 20 days, compared to an average review time of more than 70 days for all EPA rules over the same period. Statistics can be derived from data available at www.RegInfo.gov.

staff or science advisors, there will be a conflict in the administrative record, falsely framed as a policy choice inconsistent with the “science.” Judges find it easy to vacate administrative decisions in such circumstances. Whatever doubts she may have about the merits of the options placed before her, the safest thing for the Administrator to do is simply acquiesce in the recommendations of her staff. The deference that courts properly owe to the political branches is captured, instead, by an unelected bureaucracy and outside science advisors.

2.7. Summary

The NAAQS process exemplifies the incentives at work that compel every party to the regulation to engage in the science charade. First, Congress directs EPA to set the standards to achieve noble goals, but restricts the agency from considering key factors, falling prey to the positive-normative fallacy by asserting instead the pretense that science alone is sufficient to develop policy. Combined with tight deadlines, the statutory language permits Congress to take credit for laudable public goals, while blaming the executive branch’s execution for any undesirable outcomes. The courts have reinforced a limited interpretation of the Act, as well as tight deadlines for issuing revised standards. Executive branch career and policy officials respond by developing scientific-sounding explanations to justify one standard over another, and public interveners vigorously defend alternative standards based on their own interpretation of the science.

Scientists argue for the primacy of their data, analysts have an incentive to downplay rather than reveal uncertainties regarding their predictions or the implications of key risk assessment policy choices, and decision makers point to science as either requiring a new standard or as determining that existing standards are adequate.

This has evolved into an adversarial process, characterized by harsh rhetoric in which each party claims the science supports its preferred policy outcome and questions opponents’ credibility and motives, rather than a constructive discussion regarding appropriate assumptions and data. The real reasons for selecting a particular standard may not even be discussed.

Furthermore, EPA is setting standards for fine particulate matter and ozone that are unattainable for the foreseeable future for many parts of the country.¹¹⁰ Perhaps most important, the actual public health and welfare benefits of these standards, particularly when one considers the opportunities forgone, are in considerable doubt.¹¹¹

¹¹⁰ EPA lists areas in nonattainment with each of the NAAQS on its website: Available at:

<http://www.epa.gov/airquality/greenbook/hnc.html>

¹¹¹ Cox, Louis Anthony. “Reassessing the human health benefits from cleaner air.” *Risk Analysis* 2012 May; 32(5):816-29.

3. CONCLUSIONS AND RECOMMENDATIONS

Despite the National Academy of Science's guidance over 30 years ago, controversy remains surrounding regulatory actions aimed at reducing risk, leading to accusations of "politicized science," "advocacy science," or "junk science." The analysis here suggests that "scientized policy" is a more accurate name for the problem, and that it stems from what the Academy in 1983 identified as "a blurring of the distinction between risk assessment policy and risk management policy."¹¹²

In thinking about reforms to improve how science is used in developing regulations, clarifying which aspects of the decision are matters of science and which are matters of policy is essential to avoid both the politicization of science *and* the scientization of policy. When people condemn the "politicization" of science,¹¹³ the problem may really be that we ask too much of science in addressing policy problems. Many statutes, including the Clean Air Act, succumb to the positive-normative fallacy and do not permit transparent consideration of relevant policy factors when developing regulations. As the BPC recommended, a focus of reform should be on devising regulatory processes that, "in as many situations as possible, ... help clarify for both officials and the general public which aspects of disputes are truly about scientific results and which concern policy."¹¹⁴ This would not only help address the positive-normative fallacy, but also the problem of hidden policy judgments, in which the effect of risk assessment policy judgments on estimates of outcomes are not acknowledged. "This transparency would both help force values debates into the open and could limit spurious claims about, and attacks on science."¹¹⁵

Numerous experts have offered specific recommendations for improving the conduct of regulatory science. The recommendations that follow attempt to alter the incentives of the parties to the rulemaking process; the first category would address behavior contributing to the positive-normative fallacy, the second would address the problem of hidden policy judgments, and the third would improve incentives generally.

3.1. Positive-Normative Fallacy

1. Legislators must be more forthright in recognizing that "science" is a positive discipline that can inform, but not decide, appropriate policy.

It would be challenging to convince legislators to avoid the positive-normative fallacy and resist delegating decisions to agencies on the pretense that "science" alone can make the normative

¹¹² National Academic Press, "Red Book." 1983.

¹¹³ Mooney, C. *The Republican War on Science*. New York: Basic Books; 2006.

¹¹⁴ Bipartisan Policy Center, 2009:4.

¹¹⁵ Bipartisan Policy Center, 2009:5.

determination of what policy should be. For legislators to make the effort to elevate the debate above simple rhetoric, they must have different incentives and expectations of rewards than exist now. Currently, there is no feedback loop to reward a politician for tackling these issues openly and seriously.

Comparing the effectiveness of different statutes can be illuminating, however. Some statutes directed at health, safety and environmental risks have facilitated more rational regulatory policy than others by recognizing that risk management requires normative judgments that consider tradeoffs. For example, the Safe Drinking Water Act requires EPA to consider the costs as well as the benefits of requiring local water authorities to install controls for specific substances. Perhaps that is one reason why the debates over drinking water standards are generally less acrimonious than debates over ambient air quality standards. Since the statute allows explicit consideration of tradeoffs when setting standards, the full burden of decision-making is not vested in the risk assessment. As a result, policy makers and interested parties may have less incentive to embed policy preferences in the risk assessment portion of the analysis, because they can debate them openly and transparently in the risk management discussion.¹¹⁶

Codifying executive requirements for regulatory impact analysis, including benefit-cost analysis, could provide a “supermandate” that would require agencies explicitly to present uncertainties and tradeoffs and to justify decisions in a transparent manner.¹¹⁷

2. Legislators and policymakers must clarify the appropriate role for scientific advisors.

The engagement of scientific advisory panels can provide a valuable source of information and peer review for agency science, but greater efforts should be made to restrict their advice to matters of science, and not ask them to recommend specific regulatory policies. When asked to advise on policy choices, as the case with CASAC, it is difficult for members not to embed their policy views in their scientific recommendations.¹¹⁸

As a former EPA scientist observed:

¹¹⁶ Dudley & Gray, 2012.

¹¹⁷ Dudley, Susan E. “Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future.” *Case Western Reserve Law Review*. Vol 65, No. 1 (Summer 2015)

¹¹⁸ “The choices that must be made on defining or clarifying policy relevant to meeting the legislative mandates must be made by the Administrator and/or by Congress through revisions to established Acts, and CASAC’s role must be limited to highlighting the issues at the science-policy interface and the scientific knowledge that informs these issues.” Hopke, Philip K. “Comments on the NAAQS Review Process.” 2006. Available at: A-17. [http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/Vanessa%20Memo_03-16-06/\\$File/sabso-casac_memo_and_comments.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/Vanessa%20Memo_03-16-06/$File/sabso-casac_memo_and_comments.pdf)

Scientific information must remain a cornerstone of public policy decisions, but I offer cautionary guidance to scientists: get involved in policy deliberations, but play the appropriate role. Provide facts, probabilities, and analysis, but avoid normative science. Scientists have much to offer the public and decision-makers, but also have much to lose when they practice stealth policy advocacy.¹¹⁹

Cox observes:

Experts, like other people, typically have high confidence in their own judgments, even when these lack objective validity.¹²⁰ But subjective confidence in subjective judgments should not be used in place of sound, objective scientific methods. To do so, as in EPA's risk assessment for ozone, replaces sound science with potentially arbitrary, biased, and mistaken judgments.¹²¹

Legislators should be clear, when establishing committees like CASAC, to limit the role of scientific advisory panels to advising on science. Executive branch policy officials should also be very clear in drafting charge questions for advisory committees to solicit their scientific expertise without encouraging them to blur the lines between scientific expertise and policy judgment.¹²² As both the BPC and Keystone reports emphasized, the questions posed to such panels "should be clearly articulated, and 'explicitly differentiate, to the extent possible, between questions that involve scientific judgments and questions that involve judgments about economics, ethics, and other matters of policy.'" ¹²³

3.2. Hidden Policy Judgments

3. The executive branch must recognize that risk assessment necessarily involves assumptions and judgments as well as pure scientific inputs, and establish procedures and incentives to make more transparent the effect different credible risk assessment inputs and assumptions have on the range of plausible outcomes.

This recommendation continues the theme of expert reports issued over the last three decades, including recent recommendations from the Institute of Medicine and BPC. One way to make the

¹¹⁹ Lackey, 2013.

¹²⁰ Kahneman D. *Thinking Fast and Slow*. 2011. Farrar, Straus, and Giroux. New York, New York. (as cited in Cox 2014)

¹²¹ Cox 2014.

¹²² Several former CASAC officials encouraged EPA to be clearer in its charge questions to distinguish between science and policy. Environmental Protection Agency Clean Air Scientific Advisory Committee (CASAC). CASAC Input on EPA's revised NAAQS Review Process; 2006 March. Available at: <http://yosemite.epa.gov/sab/sabproduct.nsf/WebCASAC/NewNAAQSProcess?OpenDocument>

¹²³ The Keystone Center, 2012: 8. (Internal citation to BPC at 5.)

risk assessment policy choices more transparent would be for agency scientists to calculate and present multiple risk estimates based on a variety of scientifically plausible data sets, endpoints, models, *etc.*¹²⁴ This would be in stark contrast to the current practice in which agencies embed multiple risk assessment policy choices in a single assessment, which facilitates what one former EPA scientist calls “stealth advocacy... because the average person reading or listening to such scientific statements is likely unaware of the underlying advocacy [and] ... hidden policy preferences.”¹²⁵

Once a range of plausible risk outcomes is identified based on different scientifically plausible inputs, agencies could transparently identify which set of inputs, model, and outcome comported with its preferred risk assessment policy choice. Policy officials would choose specific numerical values from a range of scientifically plausible risk estimates and publically defend the risk assessment policy choices that support that choice. This would provide a serious incentive for policy officials to look into estimates of risk, consult with a broad variety of experts to understand the range of scientific views and explicitly articulate the policy preferences informing their decisions.

Greater transparency regarding the assumptions and policy rationales for choosing one set of assumptions or models over another would not only encourage more openness and constructive discussion about science and policy, but would likely engender greater acceptance of the ultimate policy decision reached.¹²⁶

4. The executive branch should increase the robustness of regulatory science by institutionalizing reforms that encourage greater feedback and challenge.

Greater transparency in the models, assumptions, and risk assessment policy choices could encourage more open, constructive debate on those choices. The scientific method depends on falsifiable hypotheses, data gathering, replication, dissent, and challenge, to ensure objective analysis to minimize bias in the interpretation of results.

No one is truly objective. We all approach problems with our own prior views and perceptions, and, particularly when faced with new or incomplete information, we tend to look to others in whom we trust to help form our opinions and make decisions. Research suggests that individuals form more extreme views when surrounded by others with similar perspectives.¹²⁷ Institutional reforms that engage competing views could go a long way to improve the clarity of the risk assessment process and the decisions that depend on scientific input.

¹²⁴ Dudley & Gray 2012

¹²⁵ Lackey, 2013.

¹²⁶ Dudley & Gray, 2012.

¹²⁷ Sunstein, 2009.

President Obama has built on his predecessors' efforts to provide for interagency review of different aspects of regulatory decisions, including the underlying science. He has directed agencies to encourage an "open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole, ... including relevant scientific and technical findings."¹²⁸

Successful reforms might involve pre-rulemaking disclosure of risk assessment information, to engage broad public comment on the proper choice of studies, models, assumptions, etc. long before any policy decisions are framed, and "positions" established. Advanced notices of proposed rulemaking could be used effectively to gather such input.¹²⁹

5. Scientific advisory panels should be required to represent a diversity of perspectives, disciplines, expertise, and experience.

The 2012 Keystone Group report offers a series of recommendations on "the composition of committees that are empaneled to review the science behind a regulatory decision."¹³⁰ Acknowledging the importance of choosing panelists that "have the knowledge, training, and experience needed to address the charge to the panel,"¹³¹ it admonished agencies "to recognize that all potential panelists will have conscious and unconscious biases," and said that "the panel selection process requires review of the disclosed information and a judgment as to the ability of each prospective panelist to participate in open discussion and to consider other perspectives."¹³²

The report goes on to recommend:

Because biases exist, an agency should strive to engage a wide range of perspectives of qualified scientific experts. We endorse the BPC report's statement that, "Agencies should not shy away from including scientists on a panel who are considered 'outliers' on the question(s) under consideration, provided that the scientist is a respected practitioner in a relevant field and the committee as a whole fairly represents the mainstream."¹³³

¹²⁸ Obama, Barack. Executive Order 13563. "Improving Regulation and Regulatory Review." 76 FR 3822 January 18, 2011.

¹²⁹ Balla, Steven J. and Dudley, Susan E. "Stakeholder Participation and Regulatory Policymaking in the United States." A report prepared for the *Organisation for Economic Co-operation and Development*. 2014. <http://regulatorystudies.columbia.gwu.edu/sites/regulatorystudies.columbia.gwu.edu/files/downloads/Balla-Dudley-US-Stakeholder-Reg-Process-11-2014.pdf>

¹³⁰ Keystone, 2012:4.

¹³¹ Keystone, 2012:14

¹³² Keystone, 2012:15

¹³³ Keystone, 2012: (quoting BPC at 24)

Former CASAC Chair George Wolff's observations, quoted above, that the lack of balance among the individuals EPA empaneled to review the PM standards published in 2006 "predetermined the outcome of the review"¹³⁴ illustrates the effects on policy of not engaging a range of perspectives.

3.3. Improving incentives for feedback, learning and experimentation

6. The legislative and executive branches should institutionalize feedback through retrospective review of regulatory outcomes.

Regulatory programs are rarely subjected to rigorous evaluation and feedback. Most regulatory analyses rely on models and assumptions to make predictions about the risk reduction benefits that will accrue from a specific intervention. Institutionalizing a requirement to evaluate whether the predicted effects of the regulation were realized would provide a powerful incentive to improve the use of science for predicting the benefits of interventions.

President Obama's executive orders to agencies to review their regulations "to determine whether [they] should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives"¹³⁵ could facilitate better retrospective analysis. However, these and previous retrospective review guidelines have met with limited success, largely because they did not change underlying incentives.¹³⁶ For example, Section 812 of the Clean Air Act Amendments of 1990 requires EPA periodically to assess the benefits and costs of the Act,¹³⁷ but EPA's assessment under this provision has relied on the same modeling it used for ex ante analysis, so it has not provided information necessary to validate estimates or underlying risk assessment assumptions and procedures. A useful evaluation would measure population changes with respect to the predicted outcome following the regulatory intervention. For example, actual reductions in cancer rates would be compared to predicted reductions to determine if actual experience corroborates or challenges the hypothetical benefits. Cox offers concrete recommendations for applying statistical tools to test "how changes in inputs (such as exposure)

¹³⁴ Wolff, 2006.

¹³⁵ Executive Order 12866 (1993) and Executive Order 13563 (2011).

¹³⁶ Dudley, Susan E. *Testimony before the Joint Economic Committee: Reducing Unnecessary and Costly Red Tape through Smarter Regulations*, June 26, 2013, http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/2013_06_26_Dudley_JEC_statement.pdf

¹³⁷ EPA Office of Air and Radiation. *The Benefits and Costs of the Clean Air Act from 1990-2012: Summary Report*. Environmental Protection Agency; 2011 March. Available at: <http://www.epa.gov/oar/sect812/feb11/summaryreport.pdf>

propagate through a network of validated causal mechanisms to cause resulting changes in outputs (such as health effects).¹³⁸

Agencies should be required to include in proposed regulations a framework for empirical testing of assumptions and hypothesized outcomes. To incentivize more robust evaluation along the lines identified above, agencies could be required to test the validity of risk-reduction predictions before commencing new regulation that relies on models. The five-year NAAQS reviews, for example, could be required to apply quasi-experimental (QE) techniques to gather and analyze epidemiology data and health outcome trends in different regions of the country and compare them against predictions.¹³⁹

Congress and OMB should reallocate resources from ex ante analysis to allow agencies to gather the information and evaluation tools necessary to validate ex ante predictions. Shifting resources from ex ante analysis to ex post review would not only help with evaluation, but would improve our ex ante hypotheses of regulatory effects.

Retrospective review should not be left exclusively to regulatory agencies, which have little incentive to find fault with their regulations, but should be subject to third-party evaluation.¹⁴⁰ And, mechanisms such as sunset provisions, or offsets (as applied in other countries) could provide incentives for objective evaluation of regulations' effects.¹⁴¹

7. Regulations should be designed to facilitate natural experimentation and learning.

Designing regulations from the outset in ways that allow variation in compliance is essential if we are to go beyond observing mere associations and gather data necessary to test hypotheses of the relationship between regulatory actions, hazards, and risks.

QE evaluation techniques provide an opportunity to improve understanding of the relation between human health and particulates air pollution. In a QE evaluation, the researcher compares outcomes between a treatment group and a control group, just as in a classical experiment; but treatment status is determined by politics, an

¹³⁸ Cox, 2015.

¹³⁹ Cox 2015, and Domenici, Greenstone & Sunstein, 2014

¹⁴⁰ As Greenstone observed, "the process of self-evaluation is challenging for all organizations, as it requires complete objectivity. Indeed, history is unkind to organizations that fail to get outside reviews of their work." Statement of Michael Greenstone, Milton Friedman Professor of Economics, University of Chicago, Director, Energy Policy Institute at Chicago, before the United States Senate Subcommittee on Regulatory Affairs and Federal Management Roundtable on "Examining Practical Solutions to Improve the Federal Regulatory Process." June 4, 2015

¹⁴¹ Dudley, Susan E. "Can Fiscal Budget Concepts Improve Regulation?" GW Regulatory Studies Center Working Paper. <http://regulatorystudies.columbian.gwu.edu/can-fiscal-budget-concepts-improve-regulation> (July 2015)

accident, a regulatory action, or some other action beyond the researcher's control. The key difference with an observational study in this setting is that the QE approach is devoted to identifying treatment-induced variation in particulates that plausibly mitigates confounding or omitted variables bias in the estimated relation between human health and particulates, rather than relying on the variation presented by nature and optimizing agents. Despite the "nonrandom" assignment of treatment status, it is possible to draw causal inferences from the differences in outcomes (by "outcomes," we refer to both air pollution levels and human health) between the treatment and control groups in a quasi- or natural experiment, provided certain assumptions are met.¹⁴²

Agencies could conduct pilot studies or "deploy different regulations where empirical evaluations of such differences will help resolve disputed issues of regulatory policy."¹⁴³

8. The scientific studies used to support regulation should be subject to peer review and their results reproducible.

Peer review is often considered a fundamental component of the scientific process. Concerns over the extent and rigor of review of important scientific analyses led OMB in 2004 to issue a memorandum establishing guidelines for the use of external peer-review at all federal agencies and departments.¹⁴⁴ OMB has also directed agencies to issue information quality guidelines to, among other things, ensure the objectivity of information, including "a high degree of transparency about data and methods to facilitate the reproducibility of such information by qualified third parties."¹⁴⁵ These guidelines did not require reproducibility, however, observing that "reproducibility of data is an indication of transparency about research design and methods and thus a replication exercise (i.e., a new experiment, test, or sample) shall not be required prior to each dissemination."

Yet recent analyses showing that most published studies are not reproducible¹⁴⁶ are leading to calls for a greater focus on more sharing of data and experimental transparency.¹⁴⁷ The journal *Science*, for example, has undertaken "initiatives to increase transparency and promote

¹⁴² Domenici, Greenstone & Sunstein. 2014:258

¹⁴³ John O. McGinnis. *Accelerating Democracy: Transforming Governance through Technology*. Princeton University Press. 2012:311.

¹⁴⁴ U.S. Office of Management and Budget. 2004. *Information Quality Bulletin for Peer Review*. <http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-03.pdf>

¹⁴⁵ U.S. Office of Management and Budget. 2002. "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies." 67 FR 8452

¹⁴⁶ Open Science Collaboration. (2015). "Estimating the reproducibility of psychological science." *Science*. <https://osf.io/ezcuj/wiki/home/>

¹⁴⁷ Joel Achenbach, "The new scientific revolution: Reproducibility at last." Washington Post. January 27, 2015.

reproducibility in the published research literature... Connected to that progress, and an essential element to its success, an additional focus will be on making data more open, easier to access, more discoverable, and more thoroughly documented.”¹⁴⁸

As the *Science* editorial observes, “When the greatest number of creative and insightful minds can find, access, and understand the essential features that led to the collection of a data set, the data reach their highest potential.”¹⁴⁹ A greater emphasis on reproducibility can encourage challenge and validation so important to the scientific method.

9. Legislation should recognize that states have a core interest in environmental quality, and that experimentation and competition among states can be a powerful force for improving environmental outcomes and our practical knowledge of what works.

Many environmental statutes are structured, appropriately, with a prominent federalist framework. Much of the on-the-ground work is left to states, which makes sense because pollution is primarily a problem of local externalities, and also because local knowledge and local experimentation can be brought to bear on problems that are not susceptible to one-size-fits-all federal rules. As implemented, however, the NAAQS process assigns to EPA staff an artificial scientific determination, isolated from any practical considerations, and assigns to the states all of the problems of implementation, while depriving them of the policy discretion that might allow them to solve those problems. The resulting dynamic channels competitive energy into unproductive directions.

Perhaps a better division of responsibility would be for the federal government to conduct basic risk assessment research and share information on environmental damages, but to defer to states on decisions regarding the risk management policies appropriate for their situations. This would offer several advantages. First, it would help distinguish risk assessment from risk management. Second, it would encourage risk management decisions to be made where they can best reflect the circumstances and preferences of affected citizens. Third, the nation as a whole would gain from experimentation regarding how different policy measures work in practice, without imposing untried systems on the entire nation.¹⁵⁰ Such an approach would provide the natural experimental framework and data needed for more QE evaluation.

¹⁴⁸ *Science* 2 January 2015: Vol. 347 no. 6217 p. 7

¹⁴⁹ *Science*, January 2015.

¹⁵⁰ Where there are large national economies of scope, such as the development of vehicle emission standards, the risk management could be done at the national level. Absent such economies, greater discretion on risk management should remain with the states. Wallace E. Oates suggests that “the introduction in the 1970s and 1980s of a variety of emissions trading systems at the state level demonstrated the feasibility of such systems and some of their very appealing properties—as well as certain pitfalls.” He suggests that this state-level experimentation with innovative solutions to emissions problems led to the successful introduction of the national

10. Agencies should engage in collaborative tools to generate knowledge.

Nobel laureate Friedrich von Hayek identified the central problem facing public policy as “the unavoidable imperfection of man’s knowledge and the consequent need for a process by which knowledge is constantly communicated and acquired.”¹⁵¹ Hayek’s focus was on economic planning and he showed that decentralized markets focus dispersed information – information that no one individual can obtain – and convey it efficiently to market participants. Many of the risks of concern to regulatory agencies may not be accounted for in market transactions, however. In these cases, we may require a different solution to address Hayek’s observation that relevant facts are never possessed by a single mind, to take advantage of knowledge “that is dispersed among many people.”

New media may provide a vehicle for stimulating a broader exchange of ideas and expanding our knowledge by reducing transaction costs, significantly lowering the costs of gathering and aggregating information, and removing obstacles to collaboration across a wide spectrum of individuals.¹⁵² E-rulemaking provides a platform for following and commenting on federal regulations, but to date, it has mainly served to facilitate traditional notice and comment, and not generated interactive, iterative engagement.^{153, 154}

To harness the wisdom of dispersed knowledge, agencies or outside parties might experiment with a collaborative “wiki” approach to public comment, where, rather than each individual or group filing comments in parallel and the agency responding to those comments individually, it could provide a forum for diverse individuals to build on each other’s information, adding, editing, updating, and correcting to engage the wisdom of dispersed knowledge on issues where no one person has complete information.¹⁵⁵ Larry Sanger, founder of Wikipedia, calls this “distributed knowledge collaboration.”¹⁵⁶

One big advantage of a wiki approach is what Shirky calls its “publish-then-filter” model, where editing is done after something is posted, rather than before. Participants don’t need to worry that their post is incomplete or may have inaccuracies because other participants can expand or correct it.

system of tradable sulfur allowances under the 1990 Clean Air Act Amendments. Oates, W.E. Environmental Federalism. Resources for the Future (RFF); 2009. Available at: <http://www.rff.org/Publications/WPC/Pages/Environmental-Federalism-Wallace-E-Oates.aspx>

¹⁵¹ Hayek F.A. 1945. “The use of knowledge in society.” *American Economic Review* 35, No. 4: 519-530.

¹⁵² Shirky, Clay. *Here Comes Everybody: The Power of Organizing Without Organizations*. New York: Penguin Press. 2008.

¹⁵³ Dudley & Gray, 2012.

¹⁵⁴ Balla & Dudley, 2014.

¹⁵⁵ Dudley & Gray, 2012.

¹⁵⁶ Sanger, Larry “Toward a New Compendium of Knowledge.” 2006. <http://www.citizendium.org/essay.html>

In a system where anyone is free to get something started, however badly, a short, uninformative article can be the anchor for the good article that will eventually appear. Its very inadequacy motivates people to improve it; many more people are willing to make a bad article better than are willing to start a good article from scratch.¹⁵⁷

Engaging public input through a wiki is an intriguing possibility that holds the potential to revolutionize how agencies gather information on which to base public policies.

4. Conclusions

Institutional arrangements in the regulatory development process tend to aggravate two contributors to the scientization of policy: the “positive-normative fallacy” (not acknowledging that science alone is insufficient to resolve normative policy questions) and “hidden policy judgments” (not acknowledging the policy judgments inherent in risk assessment). By framing issues as resolvable by science, current practices both threaten the credibility of the scientific process, and harm resulting regulatory policy. Many of those involved in regulatory decisions have incentives to hide rather than reveal the uncertainty in assessments of risk and to dismiss and denigrate dissenting views. Key policy choices, disguised as science, rest with technical staff; meanwhile, policy makers charged with making hard policy decisions are able to avoid responsibility by claiming that their hands were tied by the science.

This paper has examined the process by which EPA sets NAAQS under the Clean Air Act to illustrate some of the perverse incentives involved in developing regulations, and offered possible mechanisms to improve those incentives and resulting policy.

Effective environmental policy that focuses resources on addressing real threats to public health and the environment depends on reliable scientific information and transparent policy choices. The mechanisms offered here could reduce acrimony and improve the debate over environmental policy by helping to distinguish between risk assessment and risk management, avoiding the positive-normative fallacy, and making more transparent previously hidden policy judgments. This will improve not only environmental outcomes, but the integrity of environmental science itself.

¹⁵⁷ Shirkey, 2008:122.

TESTIMONY
OF
SIDNEY A. SHAPIRO

FRANK U. FLETCHER CHAIR OF ADMINISTRATIVE LAW
WAKE FOREST UNIVERSITY SCHOOL OF LAW
AND
MEMBER SCHOLAR, VICE-PRESIDENT
CENTER FOR PROGRESSIVE REFORM

BEFORE THE COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENT AFFAIRS
UNITED STATES SENATE

HEARING ON 'A REVIEW OF REGULATORY REFORM PROPOSALS'
SEPTEMBER 16, 2015

Chairman Johnson, Ranking Member Carper, and Members of the Committee, thank you for inviting me here today to share with you my views on the proposed regulatory reform legislation under consideration by this Committee. In my testimony, I will measure these proposals against each of the three principles that undergird administrative procedure—accountability, fairness, and productivity. None of the proposed regulatory reforms would improve the productivity of agencies. Instead, to varying degrees, the proposed bills would reduce productivity. Likewise, the bills vary concerning the extent to which they address gaps in accountability and fairness that might exist in the current system. For the most part, however, the proposed legislation would reduce agency productivity for little or no net gain in accountability and fairness.

I am the Frank U. Fletcher Chair of Administrative Law at the Wake Forest University School of Law. I am also a Member Scholar and Vice-President of the Center for Progressive Reform (CPR) (<http://www.progressivereform.org/>). Founded in 2002, CPR is a 501(c)(3) nonprofit research and educational organization comprising a network of more than 50 scholars across the nation dedicated to protecting health, safety, and the environment through analysis and commentary.

My work on regulation and administrative law includes ten books, seven book chapters, and over fifty-five articles (as author or coauthor). My latest book (co-authored with Joe Tomain), was published in 2014 by the Oxford University Press and addressed the importance of government institutions, including the regulatory state, for promoting democratic values. I have served as consultant to government agencies and have testified before Congress previously on regulatory subjects.

I. THE BENEFITS OF REGULATION

All regulations share the same starting point: A provision in a statute passed by both Houses of Congress and signed by the President that authorizes or directs an agency to regulate. Whenever an executive or independent agency issues a rule, it is acting pursuant to authority provided in duly enacted legislation for achieving a specified policy goal, although that authority often leaves room for the exercise of at least some agency discretion, enabling agency experts to apply their specialized knowledge and skills to designing the most effective policies for achieving the statutorily specified goal. The legislation from which agencies derive their authority to regulate reflect a determination by a majority of both Houses of Congress and the President that there is pressing national problem that merits the government's attention, and that regulation is an appropriate response to that problem because it will promote the public interest in some way, such as by protecting health and the environment.

It is a good thing that Congress has directed agencies to issue regulations to achieve important social goals because these regulations have produced enormous benefits for the American people.¹ Consider the following:

¹ See Sidney A. Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* (Ctr. for Progressive Reform, White Paper 1109, 2011), available at http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

- The White House Office of Management and Budget (OMB) estimates that regulatory benefits exceed regulatory costs by about 8 to 1 for significant regulations.² The Environmental Protection Agency (EPA) estimates that the regulatory benefits of the Clean Air Act exceed costs by a 25-to-1 ratio.³
- The failure to regulate some hazards related to the workplace, the environment, product safety, food safety, and more, and the failure to enforce existing regulations on such hazards results in thousands of deaths, tens of thousands of injuries, and billions of dollars in economic damages every year. Sometimes, the damages reach a catastrophic scale. The BP Oil Spill caused tens of billions of dollars in damages.⁴ The Wall Street collapse may have caused trillions. Regulation to prevent catastrophe can be far cheaper, and less painful, than cleaning up damage to lives, property, and the environment later.⁵
- Dozens of retrospective evaluations of regulations by the EPA and the Occupational Safety and Health Administration (OSHA) have found that the regulations were still necessary and that they did not produce significant job losses or have adverse economic impacts for affected industries, including small businesses.⁶

Individual examples of regulatory successes paint an even more compelling portrait. The EPA estimates Clean Air Act rules saved 164,300 adult lives in 2010, and will save 237,000 lives annually by 2020. The National Highway Traffic Safety Administration's vehicle safety standards have reduced the traffic fatality rate from nearly 3.5 fatalities per 100 million vehicle miles traveled in 1980 to 1.41 fatalities per 100 million vehicle miles traveled in 2006. An Endangered Species Act recovery program developed by the U.S. Fish and Wildlife Service

² OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, DRAFT 2014 REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND UNFUNDED MANDATES ON STATE, LOCAL, AND TRIBAL ENTITIES 11, available at

https://www.whitehouse.gov/sites/default/files/omb/inforeg/2014_cb/draft_2014_cost_benefit_report-updated.pdf.

³ ENVTL. PROTECTION AGENCY, THE BENEFITS AND COSTS OF THE CLEAN AIR ACT FROM 1990 TO 2020, 7-9 (Mar. 2011), available at <http://www.epa.gov/oar/sect812/feb11/fullreport.pdf>.

⁴ See Aaron Smith, *BP: We've Spent \$2 Billion on Clean-Up*, CNNMONEY, June 21, 2010, available at http://money.cnn.com/2010/06/21/news/companies/bp_oil_spill/index.htm. In June of 2010, Credit Suisse predicted that the total costs would be around \$37 billion, with \$23 billion in clean-up costs and \$14 billion in settlement claims. Linda Stern, *Gulf Oil Spill Could Cost BP as Much as \$37 Billion*, MONEYWATCH.COM, June 8, 2010, available at <http://moneywatch.bnet.com/economic-news/blog/daily-money/gulfoil-spill-could-cost-bp-as-much-as-37-billion/728/>.

⁵ OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, FISCAL YEAR 2012: ANALYTICAL PERSPECTIVES: BUDGET OF THE U.S. GOVERNMENT 47 (2011), available at www.whitehouse.gov/sites/default/files/omb/budget/fy2012/assets/spec.pdf. The Congressional Budget Office (CBO), which employs a different methodology for calculating costs than does the OMB, estimates the costs of TARP to be \$19 billion. CONG. BUDGET OFFICE, REPORT ON THE TROUBLED ASSET RELIEF PROGRAM—MARCH 2011, 1 (2011), available at <http://www.cbo.gov/ftpdocs/121xx/doc12118/03-29-TARP.pdf>. See also BARBARA BUTRICA, KAREN E. SMITH, & ERIC TODER, HOW WILL THE STOCK MARKET COLLAPSE AFFECT RETIREMENT INCOMES? 1 (The Urban Institute, Older Americans' Economic Security Report No. 20, 2009), available at http://www.urban.org/uploadedpdf/411914_retirement_incomes.pdf.

⁶ Sid Shapiro et al., *Saving Lives, Preserving the Environment, Growing the Economy: The Truth About Regulation* 10, 20-30 (Ctr. for Progressive Reform, White Paper 1109, 2011), available at http://www.progressivereform.org/articles/RegBenefits_1109.pdf.

helped increase the Bald Eagle population from just 400 nesting pairs in 1963 to 10,000 nesting pairs in 2007, enabling the Service to remove Bald Eagles from the Endangered Species List.⁷

II. PRINCIPLES OF ADMINISTRATIVE PROCEDURE

While it is important that agencies protect the public, those protections must be achieved in an accountable and fair manner. The role of administrative procedures is to ensure sufficient accountability and fairness. But it is possible to have too much of a good thing. While it is always possible to add more procedures, we must also consider the impact of doing so on an agency's capacity to protect the public.⁸ Administrative procedure must "comport with efficiency while also ensuring fairness and negating the fear of unchecked power."⁹ We must achieve an appropriate balance between accountability, fairness, and the capacity of agencies to complete their statutory mission. In the design of administrative procedure, "[i]t is equally important . . . to provide mechanisms that will not delay or frustrate substantive regulatory programs."¹⁰

In short, administrative procedure seeks to advance the principles of accountability, fairness, and productivity, and the administrative state will work best when those procedures are designed in a way that properly balances these mutually competing principles. In recent decades, Congress, the president, the judiciary, and even the agencies themselves have imposed numerous new analytical and procedural requirements that must be satisfied during the course of a rulemaking. In most cases, these requirements are defended as necessary for advancing accountability and fairness, but their steady accumulation comes at the cost of productivity. At some point, however, the system can be thrown out of a balance, ultimately preventing agencies from fulfilling even their core missions of protecting the people and the environment. For this reason, the American Bar Association (ABA) recommends for "the President and Congress to: exercise restraint in the number of rulemaking impact analyses; assess the usefulness of existing and planned analyses; and ensure agencies' adherence to recommendations of the ABA and the Administrative Conference of the U.S. (ACUS) pertaining to such impact analyses requirements."¹¹

When considering new analytical and procedural requirements, policymakers should carefully evaluate them through the lens of the three principles outlined above. Among other things, this evaluation should ascertain the degree of overlap between the proposed accountability mechanism and existing accountability mechanisms, and whether the new accountability mechanism is necessary to promote an acceptable level of fairness and accountability. Next the evaluation should assess the extent to which the new accountability mechanism will further deteriorate agency productivity. Finally, the review should identify whether a less burdensome alternative is available for addressing the identified an accountability or fairness problem.

⁷ *Id.* at 5-6.

⁸ See Sidney A. Shapiro, *Paul Verkuil and Pragmatic Adjustment in Government*, 32 *CARDOZO L. REV.* 2459, 2459 (2011).

⁹ Paul R. Verkuil, *The Ombudsman and the Limits of the Adversarial System*, 75 *COLUM. L. REV.* 845, 855 (1975).

¹⁰ Paul R. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 *COLUM. L. REV.* 258, 279 (1978).

¹¹ Sec. of Admin. L. & Reg. Practice, Am. Bar Assoc., Policy: Regulatory Impact Analyses.

http://www.americanbar.org/groups/administrative_law/policy.html (last visited Sept. 13, 2015) (follow the hypertext link "Regulatory Impact Analyses" to download a copy of the Section's statement of policy).

In addition, to ensure that administrative procedure remains in proper balance, policymakers should strive to review on an ongoing basis the existing stock of analytical and procedural requirements, both individually and collectively. For example, this review could assess whether existing requirements are duplicative, thereby resulting in the waste of scarce public resources and the unnecessary delay of public protections.

Finally, I add a special word of caution. Frequently, observers of the regulatory system—either intentionally or mistakenly—conflate regulatory outcomes with which they happen to disagree with inadequate accountability and fairness in administrative process. These concepts are, of course, distinct. Whatever one may think of their substance, these rules are generally the product of a process that offers adequate accountability and fairness measures. Accordingly, the problem is not with the process, but rather with the underlying statute. Regulatory reform will not fix statutes that one opposes; availing oneself of the normal legislative process to amend or repeal those statutes instead offers the proper course of action.

III. OUR REGULATORY SYSTEM IS OUT OF BALANCE

As currently constituted, the rulemaking process contains far more mechanisms for promoting the goals of fairness and accountability than is needed. As a result, rules can take several years, if not decades to come to fruition, and scarce public resources are wasted. During these unnecessary delays, the risks these rules are meant to address do not pause or evaporate into the ether; rather, they continue unabated, threatening the health and security of families and businesses across the country.

In developing regulatory proposals, agencies are subject to a thick web of analytical and procedural requirements and their final decision-making is then subject to judicial review by federal appellate courts. If anything, there are too many of these overlapping and duplicative requirements, resulting in the need to conduct years of analysis before significant rules may be adopted. In addition, existing federal laws that govern the rulemaking process provide numerous opportunities for interested stakeholders to participate to make their views known, inform the agency if its regulatory proposals reflect factual misunderstandings, and protect their interests. Finally, even after a rule is completed, agencies have several tools at their disposal to make “back end” adjustments that enable tailored implementation for the purposes of minimizing unintended negative consequences.

The Administrative Procedure Act (APA) requires agencies to provide persons potentially affected by their regulations a fair opportunity to influence the rulemaking process. Under traditional APA rulemaking, a regulatory proposal is meant to start the discussion, not end it. Indeed, the agency must solicit and actually *consider* comments it receives from the public on the proposal. If the agency discovers during the comment process that it has strayed beyond its statutory authority, neglected relevant considerations, or misunderstood the science on which it based its proposal, the APA requires the agency to revise the rule accordingly before finalizing it, or not adopt the rule at all. This is not some hollow exercise. Rather, the courts strictly enforce it. If an agency adopts a rule without taking into account relevant public comments, the court in a

challenge to the validity of the rule has the power to send the rule back to the agency and block its implementation.

The APA has provided these protections during the rulemaking process for affected interests since 1946, but statutes and executive orders adopted beginning in the 1980s have added multiple layers of new rulemaking procedures and analytical requirements not required by the APA. As a result, the rulemaking process has become an inordinately complex, time-consuming, and resource-intensive process:

- As of 2000, an agency was subject to as many as 110 separate procedure requirements in the rulemaking process.¹² Additional procedural requirements have been added since 2000.¹³
- A flowchart developed by Public Citizen to document the rulemaking process covers several square feet, and, because of the complexity involved, it still requires tiny font in order to include every last rulemaking step.¹⁴

Regulated businesses not only take full advantage of the many existing participatory opportunities; all of the available evidence demonstrates that corporate and business entities dominate the rulemaking process in doing so. For example, when Professor Wendy Wagner and her coauthors examined 39 hazardous air pollutant rulemakings at the EPA, they found that industry interests had an average of 84 contacts per rule, while public interest groups averaged 0.7 contacts per rule.¹⁵ These included meetings, phone calls, and letters.

Similarly, representatives of corporate interests are far more likely to lobby the Office of Information and Regulatory Affairs (OIRA), a relatively obscure bureau in the White House that wields significant influence over agency rulemaking due to its role under Executive Order 12866 of reviewing the largest or most controversial pending agency rules. A 2011 CPR white paper found that over a nearly 10-year period OIRA hosted 1,080 meetings, with 5,759 appearances by outside participants.¹⁶ Sixty-five percent of the participants represented regulated industry interests as compared to just 12 percent that appeared on behalf of public interest groups.

Despite the numerous accountability and fairness mechanisms that already exists, the push for still more mechanisms continues, as the various bills under consideration in today's hearing demonstrate. Worse still, this accumulation of wasteful and time-consuming procedural and analytical requirements ignores the fact that agencies have the authority, which they regularly deploy, to make back-end adjustments in the implementation of completed rules to avoid

¹² See Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. L. REV. 533 (2000) (documenting that executive orders and statutory requirements could require as many as 110 different requirements for rulemaking), available at <http://www.law.fsu.edu/journals/lawreview/downloads/272/Seid.pdf>.

¹³ See, e.g., Exec. Order No. 13,586, 76 Fed. Reg. 3,821 (Jan. 18, 2011).

¹⁴ See PUBLIC CITIZEN, THE FEDERAL RULEMAKING PROCESS, available at <http://www.citizen.org/documents/Regulations-Flowchart.pdf>.

¹⁵ Wendy Wagner, Katherine Barnes, & Lisa Peters, *Rulemaking in the Shade: Empirical Study of EPA's Toxic Air Regulations*, 63 ADMIN. L. REV. 99, 225 (2011).

¹⁶ Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 20110), available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

unintended consequences. The mechanisms for achieving these adjustments take various forms, including exceptions, time extensions, variances, and waivers.¹⁷ To see such back end adjustments in action, one needs only to conduct a quick review of the table of contents for each day's edition of the *Federal Register*. In the September 10 edition, I found the following examples: Exemption applications from the Federal Motor Carrier Safety Administration's commercial driver's license standards; petitions for waivers of compliance with the Federal Railroad Administration; and petitions for modifications of existing mandatory safety standards with the Mine Safety and Health Administration. While opponents of regulations often cite the number of pages in the *Federal Register* to support their claim that the regulatory system is out of control, these particular pages are all dedicated to responding businesses' requests for regulatory relief.

The back-end adjustment process has several advantages over efforts to craft a perfect and omniscient regulation at the outset. First, it permits agencies to preserve relatively stringent baseline regulatory standards while still accommodating concerns that the application of these stringent rules will cause irrational or unfair results in particular cases. Regulators can make case-by-case adjustments instead of initially watering down standards in anticipation that a general rule may be counterproductive or irrational in some circumstances. Second, a back-end process addresses the delays caused by analysis requirements and the difficulty of undertaking analysis in light of informational and methodological problems. The availability of these adjustments can avoid delay in the issuance of a rule of widespread applicability because an agency can promulgate a rule and rely on regulated entities to alert it to implementation problems by filing individual requests for relief. Further, a back-end process gives regulated entities a strong incentive to produce evidence that an adjustment in a rule is justified. A process that relies on back-end adjustments to fix regulatory flaws gives those who are most likely to possess the relevant information an incentive to bring that information to the agency's attention. Unlike rulemaking, in which regulators must attempt to anticipate problems before they occur as they write general rules, incremental adjustments permit regulators to consider concrete problems, one at a time, in the context of specific circumstances. The back-end process allows agencies to make adjustments in response to circumstances that they did not anticipate when they wrote a rule.

Third, a back-end adjustment process can increase the legitimacy of the regulatory program that contains the back-end process by reducing the frustrations likely to result from the application of regulatory requirements in ways that produce harsh or anomalous results. Finally, but hardly least of all, a back-end process is one of the ways that regulators can take costs into account. A back-end adjustment process that authorizes hardship-based adjustments makes cost a relevant consideration without relying on a cost-benefit test that yields a misleading impression of analytical precision.

To be sure, careful analysis of both the need for and consequences of regulation is important. But, the regulatory process has become so ossified by needless or duplicative procedures and analyses that larger rulemakings commonly require several years—possibly more than a decade—to complete. As Professor Richard Pierce of the George Washington University Law

¹⁷ See Robert L. Glicksman & Sidney A. Shapiro, *Improving Regulation Through Incremental Adjustment*, 52 U. KAN. L. REV. 1179 (2004).

School has observed, “[I]t is almost unheard of for a major rulemaking to be completed in the same presidential administration in which it began. A major rulemaking typically is completed one, two, or even three administrations later.”¹⁸

The EPA told the Carnegie Commission that it takes about five years to complete an informal rulemaking.¹⁹ A Congressional report found that it took the Federal Trade Commission five years and three months to complete a rule using more elaborate hybrid rulemaking procedures.²⁰ (Remarkably, these reports are several decades old and thus do not take into account the additional analytical requirements that have been imposed since their publication.) More recently, OSHA estimates in a rulemaking flowchart on its website that its most complex rules might take up to 12.5 years to complete.²¹ Last month, the libertarian R Street Institute issued a report that found that delay has become so pervasive in the rulemaking process that agencies failed to meet more than 1,400 statutorily-imposed rulemaking deadlines between 1995 and 2014—or just under 50 percent of the deadline that were in effect during that period.²²

The fact that it may take five years or longer to complete the process for adopting important rules should be no surprise, as the following time schedule for significant rules indicates:

- 12-36 months to develop a proposed rule
- 3 months for OIRA review of the draft proposal
- 3 months for public comment
- 12 months to review comments and write final justification
- 3 months (or more) for OIRA review of the final rulemaking
- 2 months delay under the Congressional Review Act
- 12-36 months for judicial review (assuming a court stays the rule)

TOTAL: 47-95 months (3.9-7.9 years)

This estimate of 4 to 8 years assumes the comment period only takes 3 months, which is usually not the case, and that an agency can respond to rulemaking comments, which can number in the hundreds or even thousands, in 12 months. It also assumes the agency does not have to (1) hold an informal hearing, (2) utilize small business advocacy review panels under the Small Business Regulatory Enforcement Fairness Act (SBREFA), (3) consult with advisory committees, and (4) go through the Paperwork Reduction Act process at OIRA. Although some of these activities might be undertaken simultaneously with the development of a rule or responding to rulemaking comments, these activities have the potential to delay a rule by another 6-36 months.

¹⁸ Richard J. Pierce, Jr., *Waiting for Vermont Yankee III, IV and V? A Response to Beermann and Lawson*, 75 GEO. WASH. L. REV. 902, 912 (2007).

¹⁹ CARNEGIE COMM’N, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 108 (1993).

²⁰ FEDERAL TRADE COMM’N, 98th Cong., 2nd Sess., 155-66 (Comm. Print 98-cc 1984).

²¹ OCCUPATIONAL SAFETY & HEALTH ADMIN., THE OSHA RULEMAKING PROCESS (2012), available at https://www.osha.gov/OSHA_FlowChart.pdf.

²² Scott Atherley, *Federal Agency Compliance with Congressional Regulatory Deadlines* (R Street Policy Study No. 39, August 2015), available at <http://www.rstreet.org/wp-content/uploads/2015/07/RSTREET39.pdf>.

Meanwhile, with each passing year, the human and economic costs of these kinds of regulatory delays keep accruing. For example, the delay in regulating toxic pollution might cause death or disease in humans, damage to fragile ecosystems, or massive clean-up costs for future generations. Other human and economic costs may be less obvious, but are no less important. For example, unregulated power plant emissions of mercury will cause developmental delays for some American children. Not only will they and their families suffer as a result, but taxpayers will end up footing the bill for providing special education to children who suffer brain damage. Also less obvious are the social costs of regulatory delay. For example, each instance of delay feeds public disillusionment with the nation's democratic institutions, as voters conclude that they cannot rely on the federal government to prevent serious health, safety, and environmental threats.

Several currently pending rulemaking illustrate the pervasive problem of regulatory delay:

- According to a recent story in the *Washington Post*, it took the Department of Agriculture more than two years merely to propose an update to a regulation so that the derogatory term “midget” was eliminated as the recognized designation for small raisins.²³ This was not a controversial regulation, nor does it impose significant costs on affected industries. The long timeline was simply a reflection of the number of rulemaking procedures that the Department of Agriculture had to use in order to develop a notice of proposed rulemaking. Among other things, agency officials had to ensure compliance with the Regulatory Flexibility Act and the Paperwork Reduction Act. The comment period on the rule is open until October 20. It is unclear when the agency will be able to issue a final rule after that.
- OSHA has been working on an update to the existing silica standard to protect workers against harmful exposures to silica dust for nearly 20 years. (The agency has known for over 40 years that the existing standard is inadequate.) OSHA estimates that its proposed update, which it released in September 2013, would save nearly 700 lives and prevent 1,600 new cases of silicosis—and often fatal disease caused by excessive silica exposures—every year.
- The EPA has struggled for years to develop a rule that will impose needed controls on stormwater pollution. A form of “nonpoint source” water pollution, stormwater from developed urban and suburban areas has become a leading cause of degraded water quality, and one that remains largely unaddressed at all levels of government. The EPA has been developing a rule to establish comprehensive stormwater controls since at least 2009. The agency has made little progress in that time, however, and even a proposal seems years away from completion.
- The EPA has also made little meaningful progress in addressing another form of non-point source water pollution: manure and other wastes from concentrated animal feeding operations (CAFOs). This waste stream poses a threat to human health and wildlife and put our nation's waterways—including the Chesapeake Bay, Great Lakes, and

²³ Lisa Rein, *The Official Reference to Small Raisins as 'Midgets' is Almost Gone. It's Taken the USDA More than Two Years*, WASH. POST'S FEDERAL EYE, Sept. 3, 2015, available at <http://www.washingtonpost.com/blogs/federal-eye/wp/2015/09/03/the-official-reference-to-small-raisins-as-midgets-is-almost-gone-its-taken-the-usda-more-than-two-years/>.

Mississippi River—at risk. In the early 2000s, the EPA took another look at its CAFO regulations, which had not been updated since the 1970s. Despite some early progress, the agency still has not instituted the kind of comprehensive program needed for addressing CAFO wastes. A final, nationwide CAFO waste rule does not appear to be forthcoming anytime soon.

- The EPA, OSHA, and the Department of Homeland Security all have failed in their role of protecting Americans against disasters at chemical plants, such as the explosion at a fertilizer storage facility that levelled a large swath of West, Texas in April 2013. Following the disaster in Texas, President Obama issued an executive order, directing those agencies to begin developing new regulatory safeguards aimed at preventing similar catastrophes in the future. Despite the obvious hazards these facilities pose to communities across the country, precious little progress has been achieved. As a result, the occurrence of another, potentially larger scale explosion is a question of “when” and not “if.”

IV. EVALUATING THE REGULATORY REFORM PROPOSALS

Regulatory process reform proposals must be evaluated according to whether and what extent they properly balance the competing administrative law principles of fairness, accountability, and productivity. This evaluation should not be conducted in a vacuum; rather, these proposals must be considered in light of the current state of the regulatory system.

Taking these considerations into account, I have serious reservations about each of the proposals bills as currently drafted. If enacted, each would only throw the regulatory system even more out of balance, further subverting the principle of administrative productivity. One other blanket criticism I have for all of the bills is that most of them do not authorize additional funding for agencies to carry out the bill’s provisions, which many cases would be labor-intensive and time-consuming. I would be curious to see the Congressional Budget Office’s estimates for the costs of carrying out the bill, and I would encourage the committee to consider including revisions to the bills to ensure that these costs are paid for.

I discuss my more specific concerns with each bill below. Where applicable, I offer suggestions on how they might be revised to isolate and give greatest effect to their best features.

A. The Regulatory Improvement Act

As compared to the other bills under consideration today, this proposed legislation is not primarily focused on establishing new rulemaking procedures agencies to undertake.²⁴ The greater concern about this bill is that it would likely reduce the accountability and fairness of the

²⁴ This is not to say that implementation of this bill is unlikely to impose costly burdens on agencies. For example, the commission created by the bill would have broad authority to subpoena agencies for large swaths of information related to their existing rules. Complying with these subpoenas could be time-consuming and resource-intensive. Moreover, once enacted into law, the commission’s recommendations would impose on agencies a tight, judicially enforceable timeline to implement those recommendations. Depending on the nature of these recommendations, this process is likely to be time-consuming and resource-intensive as well, inhibiting the ability of agencies to continue carrying out their affirmative mission of protecting people and the public.

administrative system. First, it would ask nine Commissioners to judge the success of rules from across the government. Although the Commissioners may have some expertise, as the bill requires, it is doubtful that any of Commissioners or staff would have the breadth of experience and expertise to perform knowledgeable review of the rules under consideration.

Second, while it is true that the Commission's judgment will be informed by its consultation and public comment, this does not alleviate the expertise gap since the Commissioners ultimately would have to make judgments about this input. Moreover, it is notable that the bill does not require that the Commission consult with the agency that produced the regulation in the first place. Finally, rulemaking and OIRA's review is now dominated by industry interests,²⁵ and the same would be true of the Commission's review process, creating an unfair process. The fact that the bill exempts the Commission from the Federal Advisory Committee Act (FACA) reduces accountability and fairness further.

As the bill recognizes, the commission's recommendations must be enacted through legislation before they can take effect, since these recommendations would effectively revise existing laws. The bill establishes expedited procedures for legislative consideration of the regulatory review commission's recommendations that provide little opportunity for elected members of Congress carefully to consider and deliberate on the recommendations before they would be presented for an up-or-down vote.

Overall, the process created by the Regulatory Improvement Act would be duplicative of the numerous regulatory review programs that are already in place. The Regulatory Flexibility Act, for example, requires agencies to review every rule that has "a significant economic impact upon a substantial number of small entities" within 10 years after the final rule is published. Further, Executive Order 13563 requires agencies to conduct similar resource-intensive reviews on an ongoing basis for all significant rules. Furthermore, several procedures are already in place for third parties to independently evaluate agencies' existing regulatory programs. For instance, federal law establishes a network of independent Inspectors General for every major executive and independent agency, which, among other things, audits and evaluates the effectiveness of agencies' regulatory programs. In addition, Congress created the Government Accountability Office (GAO), an independent agency that works to aid Congress's oversight of the federal government.

No one denies that agencies should regularly review and assess their regulations, and many already do. Such reviews are arguably more beneficial and productive than the highly speculative *ex ante* cost-benefit analyses that agencies perform for many of their rules. Congress would be better off providing agencies with greater resources to conduct these reviews on a discretionary basis and in a form that can be tailored to the unique circumstances of the rule that is under review. Indeed, Michelle Sager, the Director of Strategic Issues at the GAO, last year testified before this committee that agencies already conduct discretionary lookbacks of their existing regulatory programs, and that these discretionary reviews were more effective than the mandatory ones in terms of producing meaningful policy changes. As she put it, "discretionary

²⁵ Rena Steinzor et al., *Behind Closed Doors at the White House: How Politics Trumps Protection of Public Health, Worker Safety, and the Environment* (Ctr. for Progressive Reform, White Paper 1111, 20110), available at http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf.

reviews generated additional action more often than mandatory reviews, which most often resulted in no changes.”²⁶

B. The Independent Agencies Regulatory Analysis Act

This bill would allow the president to subject independent agencies to a form of centralized regulatory review that is similar to what OIRA currently conducts for executive-branch agencies under Executive Orders 12866 and 13563. While the White House would not have the same gatekeeping power that it enjoys under those executive orders to stop, stall, or change executive branch agencies’ rules for political reasons, this bill would still give it unprecedented influence over independent agencies’ regulatory decision-making, allowing future presidents to block or dilute the work of independent agencies they oppose. Among other things, the bill would give OIRA up to 90 days to review independent agencies’ draft proposed and final rules to determine whether those agencies adequately complied with all of the bill’s various analytical requirements. OIRA would have the authority to issue a report outlining all of the faults it found with the agencies’ analyses, and this report would be made part of the rulemaking record where it could be used as part of a challenge to the final rule during judicial review. Independent agencies will of course be reluctant to earn an unfavorable report on their pending rules, giving OIRA significant influence to extract changes and concessions from the independent agencies, either in the form of changes to the rules themselves or by undertaking additional burdensome analyses.

Congress explicitly designed independent regulatory agencies to be institutionally insulated from excessive political interference from the president. Subjecting these agencies to executive order requirements—especially oversight by OIRA, which is without question the most potent conduit for presidential influence over new rules—would thoroughly undermine Congress’s intent.

Moreover, this oversight is unnecessary for the purpose of accountability. Congress requires independent agencies to be politically diverse with members from both political parties. This puts the commissioners who are not from the President’s political party in a position to object to proposed rules with which they disagree. This arrangement allows the agencies to remain independent of the President and yet be subject to an important substitute accountability mechanism.

Congress should also recognize that cost-benefit analysis provides less accountability than its supporters claim. Because of the difficulties of estimating regulatory costs and benefits, especially benefits, agencies are seldom able to pinpoint precise costs and benefits. Instead, they almost always identify a range of benefits and costs, and these estimates, again particularly benefit estimates, can vary widely between the minimal and maximum estimate, often by orders

²⁶ Michelle Sager, Director, Strategic Issues, U.S. Gov’t Accountability Off., Testimony Before the Subcomm. on Efficiency & Effectiveness of Fed. Programs & Fed. Workforce, S. Comm. on Homeland Security & Gov’t Affairs, 113th Cong., Hearing on a More Efficient and Effective Government: Improving the Regulatory Framework, Mar. 11, 2014, available at <http://www.hsgac.senate.gov/subcommittees/fpfw/hearings/a-more-efficient-and-effective-government-improving-the-regulatory-framework> (follow hypertext link “Download Testimony (217.7 KB)” to download testimony).

of magnitude. While cost-benefit analysis can provide some information to agencies, it is not a magic bullet fix to accountability.

Independent agencies already conduct a wide variety of economic and other analyses for the pending rulemakings. The bill would displace these efforts with one-size-fits-all analytical requirements that risk wasting scarce public resources without improving the quality of agency decision-making. Some independent agencies, such as the Commodity Futures Trading Commission, voluntarily submit some rules to OIRA for limited review, pursuant to a memorandum of understanding. Perhaps the committee could consider a bill that encourages other independent agencies to enter into such voluntary compacts. By and large, however, OIRA review does little to improve quality of decision-making by executive branch agencies. I have little confidence that extending OIRA review to independent agencies would add much value to their rulemakings.

C. The Smarter Regulations Through Advance Planning and Review Act

This bill would amend the APA to create a comprehensive and potentially burdensome one-size-fits-all regulatory lookback process for all agencies to conduct for all of their major rules. The biggest problem with this proposal is its distinct lack of flexibility; all rules would be subject to the same lookback framework regardless of whether that framework is well suited to an effective and meaningful evaluation of the rule's consequences. Another problem is that the framework's focus is biased against stronger public safeguards. For example, when conducting the mandated lookbacks for their major rules, agencies are required to determine whether the rule should be eliminated or weakened. However, the bill would not allow agencies to determine that a rule should be strengthened or expanded as a result of the lookback.

As with the Regulatory Improvement Act, the lookback process established by this bill would be duplicative of the numerous regulatory lookback programs that agencies already must conduct for their rules. The one-size-fits-all requirements of the bill also would displace the discretionary reviews that agencies conduct, which would be particularly unfortunate, since, as noted above, these discretionary reviews yield more meaningful results.

Parenthetically, I would also criticize the bill's use of the outdated definition of a "major rule." The economic threshold that the bill relies on for defining a major rule—\$100 million or more in an annual economic impact—was first defined several decades ago. That number has not been adjusted for inflation since. If it was, the economic threshold would be much higher—closer to \$700 million. Because the economic threshold is far too low, the definition of a major rule now covers many much smaller rules that certainly do not warrant the burdensome procedural requirements called for in the bill.

My recommendations for this bill would be to build more flexibility into its requirements. In particular, the bill should be aimed at encouraging discretionary reviews and to maximize the effectiveness of those reviews. I agree with the bill's essential thrust that retrospective reviews of existing rules can be extremely valuable. To maximize this value, agencies would benefit from increased resources and sufficient flexibility to design these reviews to account for the unique characteristics of the rules undergoing the review.

Another recommendation would be to amend the bill's design to encourage agencies to conduct early planning for the deployment of back-end adjustments during the rule's implementation phase, and if an agency lacks such authority, the legislation should provide it. As noted above, these back-end adjustments ensure that agency rules are suitably strong enough to achieve their regulatory goals, while providing agencies with the opportunity to tailor implementation to avoid any undesirable and unfair consequences. Agencies already deploy these mechanisms, but perhaps a revised version of this bill would enable agencies to deploy them even more effectively. In particular, the bill could seek to find ways to ensure that back-end adjustments are most effectively targeted toward small businesses that are subject to the rule's requirements.

D. The Early Participation in Regulations Act

This bill would amend the APA to impose a one-size-fits-all mandate requiring all agencies to conduct an "Advanced Notice of Proposed Rulemaking" for all of their pending "major" rules. The bill risks wasting scarce agency resources, delaying critical safeguards, and providing well-resourced corporate interests to block, dilute, or delay rules they find inconvenient.

One problem with the bill is that it would require agencies to include in the advanced notice of proposed rulemaking several detailed analyses and statements, some of which may not even be knowable to the agency at the time the advanced notice is issued. Some of the bill's requirements also appear duplicative of requirements already mandated by the Unfunded Mandates Reform Act and the Regulatory Flexibility Act.

Agencies are free to and already voluntarily conduct advanced notices of proposed rulemakings that are flexible and tailored to the unique circumstances of the particular rulemaking. Agencies as varied as the Occupational Safety and Health Administration, the Environmental Protection Agency, and the Consumer Product Safety Commission frequently issue advanced notices for their rulemakings. When tailored to the particular rulemaking at issue, these advanced notices are much more likely to generate useful public feedback that actually improves the rulemaking.

My recommendation would be to amend the bill to include greater flexibility for agencies to conduct discretionary advanced notices of rulemaking. For example, perhaps the bill could enable agencies to use advanced notices to narrow down relevant issues to streamline the rulemaking process going forward. In particular, the process could be used to establish a set of agreed upon facts related to the rulemaking and to clarify what issues are under dispute, so that the subsequent public comment period (and any potential judicial review) can be simplified. Over all, though, I agree that advanced notices can be useful, provided they are deployed effectively in appropriate cases. To enable agencies to use this tool more, Congress should strive to provide additional resources.

E. The Principled Rulemaking Act

The bill would drastically overhaul the APA by mandating that agencies satisfy several of the burdensome procedural and analytical requirements contained in Executive Orders 12866 and 13563. The bill would also expand on these orders by including additional procedural and

analytical requirements and extending compliance to independent regulatory agencies. The bill's design and intent is similar to the Regulatory Accountability Act and indeed incorporates many of its most troublesome features. Perhaps the most troubling aspect of the bill is that it appears to make agency compliance with all of these requirements judicially reviewable, which would encourage endless litigation.

Much of the bill is focused on outlining "rulemaking considerations" on which agencies must base pending rules. Critically, many of these required considerations appear to function as a "super-mandate," rewriting literally dozens of environmental, health, and safety laws by forcing agencies to adopt new decision-making criteria when deciding whether and how to regulate. As a result, some of these provisions would override popular laws such as the Clean Air Act, the Clean Water Act, the Federal Food, Drug, and Cosmetic Act, and the Dodd-Frank Wall Street Reform and Consumer Protection Act by requiring agencies. Before Congress amends such important bills, it should give careful consideration of the impact of such a super-mandate in each and every piece of legislation, most of which have provided enormous benefits to the American public without any evidence of significant disruption or excessive costs to the industries being regulated. This is truly a case of not fixing what is not broke.

As noted previously, the super-mandate that an agency's rule must pass a cost-benefit analysis does not provide a high level of accountability. While cost-benefit analysis can provide useful information about the impact of a rule in some instances, it cannot tell us what to do or what is appropriate level of regulation because of the impossibility of accurately estimating costs and benefits. Congress recognized this essential shortcoming of cost-benefit analysis when it enacted many of the existing public interest laws, because almost none of this legislation requires an agency rule to pass a cost-benefit test, and this bill would override that considered judgment.

Another of the rule's troubling considerations would impose a "least burdensome" requirement similar to the one that has rendered the Toxic Substances Control Act (TSCA) to be an ineffectual tool for protecting people and the environment against harmful chemicals.

Yet another troubling provision in the bill would impose burdensome scientific objective requirements on agencies that would potentially enable judicial interference in agency science and technical matters. The bill does not define the concept of objectivity, nor does it explain how an agency might demonstrate compliance with this requirement. In fact, the concept of "objectivity" is difficult to define since there is almost always a degree of uncertainty about scientific understandings. A scientific study does not lack objectivity because another study disputes it. Instead, agencies must do their best to understand the totality of the scientific evidence. As a result, regulatory judgments inevitably are a mixture of policy and scientific judgments. As such, they cannot be entirely "objective," assuming what the bill means by "objective" is that a regulatory decision is not made using any policy judgments whatsoever.

Given the reality of how regulatory science works, the bill invites industry challenges to agency science during judicial review that would reduce accountability and fairness. Generalist judges would be empowered to second-guess the scientific judgments of agency experts on complex matters of science, medicine, and technology on the basis of the problematic concept of "objectivity."

E. All Economic Regulations are Transparent Act

This bill would create several new reporting requirements for agencies and OIRA on pending rulemakings. The risk is that these new reporting requirements would actually undermine regulatory transparency. First, by imposing on agencies several new reporting requirements on a monthly basis, the bill would inundate the public with reams of data about the agencies' pending regulations and their impacts. Few in the general public would have the ability to realistically review all of these data and identify information that is truly important to them. Second, bill would generate misleading information about agencies' pending regulations, which would ultimately undermine meaningful public debate over these regulations and about the regulatory process in general. In particular, the bill's reporting requirements are designed to provide a biased view of pending regulation by highlighting in myriad ways their costs all while providing little or no information about their benefits.

The most basic problem with the bill is that it imposes a default delay of up to six months on all new rulemakings. As noted above, rulemakings already take several years to more than a decade to complete; such additional delay would be contrary to public's interest in a productive regulatory system.

This bill could perhaps be improved if the agencies' reports were due on an annual basis or every six months, rather than monthly. The required disclosures in each report would also need to be scaled back significantly and provisions would be needed to include information about regulatory benefits so that the public would get a complete picture of the rule's potential impacts.

V. CONCLUSION: NOW IS THE TIME TO REINVIGORATE OUR REGULATORY SYSTEM

As explained above, the regulatory system has become out of balance with an excess of procedural requirements undermining the administrative law principle of productivity. As currently drafted, the one-size-fits-all requirements that would be imposed by the proposed bills discussed above threaten to exacerbate this problem.

To restore greater productivity to the regulatory system, Congress should consider ways that it can reinvigorate agencies, enabling them to carry out their statutory missions of protecting people and the environment in a more timely and effective manner. Here are some places to start:

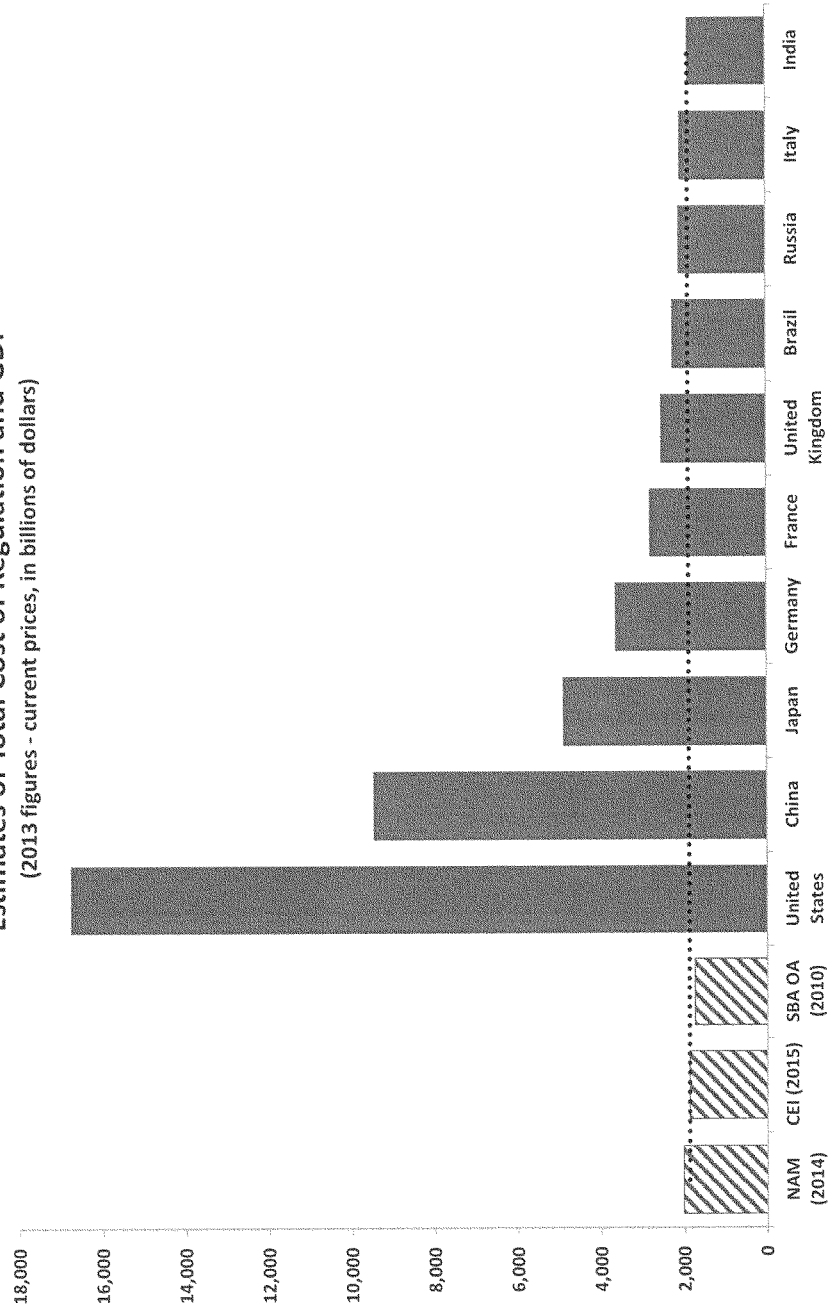
Provide agencies with the resources they need. One of the reasons that regulatory agencies cannot fulfill their statutory missions is that financial resources and available personnel have been reduced or maintained at constant levels in recent years. This has been occurring as the agencies' missions have become more complex, forcing these agencies to effectively do more with less. Many agencies' budgets have stagnated for decades, while the job at hand – more food and imported toys to inspect, for instance – has grown. And the situation is getting worse, not better. For example, past rounds of sequestration hundreds of millions of dollars from the EPA's already historically low budget. Among other things, these cuts have forced the agency to scrap several air pollution monitoring sites and scale back its program for assessing the human health impacts of several potentially harmful chemicals.

Provide agencies with enhanced legal authority. For many regulatory agencies, the statutes under which they operate have not been reviewed or refreshed in decades. The intervening years have revealed shortcomings in those statutes while new public health, safety, and environmental issues that were not initially addressed by the original statutes have emerged. In some cases, agencies lack the authority they need to tackle these issues. It is time to end the political gridlock that has prevented the adoption of legislative changes to accommodate shifting social needs.

Free agencies from unnecessary analytical requirements. Over the past few decades, the rulemaking process has become encumbered by a growing number of analytical requirements. These analytical obstacles draw upon agencies' already stretched resources and distract them from focusing on their regulatory missions without meaningfully improving the quality of agency decision-making. Regulatory process legislation of the kind introduced in Congress during the last few years would exacerbate this situation, creating a rulemaking process so laden with unnecessary and unhelpful requirements that the process would become completely dysfunctional. Perhaps that is the true aim of those who advocate an overhaul of regulatory process requirements – to construct a system that is so burdensome for agencies to navigate that they become incapable of adopting even urgently needed regulatory protections whose social benefits greatly exceed their costs. Even taking the reformers' aims at face value, they have misdiagnosed the problems with existing regulatory processes and proposed solutions that are ill-equipped to achieve the socially optimal levels of regulation they seek.

Thank you. I'd be pleased to answer any questions you might have.

Estimates of Total Cost of Regulation and GDP
 (2013 figures - current prices, in billions of dollars)



Senator Mark R. Warner

Senate Committee on Homeland Security and Government Affairs
Hearing: A Review of Regulatory Reform Proposals
Statement for the Record, September 16, 2015

I am pleased that the Committee is currently considering the Independent Agency Regulatory Analysis Act, legislation to require independent agencies to follow the same rules as other federal agencies in analyzing the costs and benefits of new regulations. As a co-sponsor of this bipartisan legislation, I believe that it will help to ensure that all agencies have a firm understanding of costs and benefits when advancing major regulations.

Federal regulations are a frequent topic on Wall Street, Main Street and at kitchen tables across the country. It is important that the federal government strike an appropriate balance between ensuring vital public safeguards and imposing costly regulatory burdens; we need balanced regulations to protect the environment and the health and safety of our citizens. This bill does not question the need for regulations – but challenges these agencies to think about smarter regulations.

Currently, the regulatory review process differs significantly between executive and independent agencies. In September, 2013, the Government Accountability Office released a report that Chairman Johnson and I requested, examining the federal rulemaking process and the extent to which agencies are adhering to existing requirements to conduct cost benefit analysis for economically significant rules. GAO found that while executive agencies monetized costs in about 97% of these cases, independent regulatory agencies monetized costs in only about 78%; additionally, independent agencies included monetized benefits in only 5% of their major rules. We need to close this gap and ensure that families and businesses face a consistent landscape when it comes to the federal regulatory process.

For 30 years, presidents of both parties have required agencies to scrutinize the costs and benefits of major new regulations, but this process has exempted independent agencies. While these agencies exercise vast power over major sectors of our economy, including telecom, agriculture, and financial services, they are exempt from these same commonsense requirements. The Independent Regulatory Analysis Act would close that gap by authorizing the president to bring independent agencies into the analysis and review process that governs executive agencies.

In both parties, legal scholars, former heads and senior official of independent agencies, and other experts have supported proposals along these lines. In fact, in January 2012 the President's Council on Jobs recommended that "Congress should require [independent agencies] to conduct cost-benefit analysis for economically significant regulations. A requirement that [independent agencies] must conduct regulatory impact analyses . . . would prompt [independent agencies] to perform better analyses and to issue better and smarter regulations."

Independent agencies, like all federal agencies, should consider the impacts—positive and negative—of their regulations on American families and businesses. The Independent Agency Regulatory Analysis Act would align these requirements and ensure that the appropriate balance is struck. I appreciate the Homeland Security and Government Affairs Committee's attention to this issue and look forward to addressing this important issue.

Statement of Michael Greenstone
Milton Friedman Professor of Economics, University of Chicago
Director, Energy Policy Institute at Chicago

Statement for the Record:
United States Senate Committee on Homeland Security and Governmental Affairs
Hearing on "A Review of Regulatory Reform Proposals"
September 16, 2015

Thank you Chairman Johnson, Ranking Member Carper, and members of the Committee on Homeland Security and Governmental Affairs for inviting me to submit this statement for the record.

My name is Michael Greenstone, and I am the Milton Friedman Professor of Economics and Director of the Energy Policy Institute at the University of Chicago, as well as a non-resident Senior Fellow at the Brookings Institution. My research focuses on estimating the costs and benefits of environmental quality, with a particular emphasis on the impacts of government regulations.

I appreciate the opportunity to present my views on the opportunities to improve the government's regulatory system. Under all economic circumstances, regulatory efficiency and clarity are crucial objectives for the credibility and predictability of the government's role in the marketplace. However in today's economy, it is absolutely essential to design a regulatory structure that protects the well-being of our citizens without imposing unnecessary costs on American businesses and society as a whole.

We can achieve these objectives without compromising our values in key areas ranging from the protection of public health to the supervision of financial markets by ensuring that the Executive and Legislative branches have the tools of analysis and measurement they need to review current and proposed regulations. The purpose of this statement is to discuss features of our regulatory system where opportunities for improvement are available and to describe some specific reforms that will strengthen these areas.

Introduction

American government, at every level, regulates a broad array of social and economic life. Regulatory policy determines the air we breathe, the quality of the water we drink, the materials we use to construct our homes, the cars we buy, the safety of our workplaces, the investments we make, and much more. Government regulates these activities because in cases of market failures, for example, our free market system does not create the necessary incentives for businesses and individuals to protect the public good.

But, in making decisions about regulations, public officials must choose which areas of our lives merit government rules, as well as how stringent those rules should be.

The Clean Air Act is a classic example of a regulation with significant benefits and costs. Before its passage in 1970, there were few constraints on businesses that emitted pollution as a byproduct of their operations. The result was poor air quality. As one small example, white-collar workers in Gary, Indiana often brought an extra shirt to work because the first would be dirty from the air and unfit to wear by midday. Even more importantly, some of my research, as well as research by others, has found that the polluted air led to sicker and shorter lives for the American people.¹ Obviously, no business sets out to cause these impacts; but, in trying to maximize their profits, it was not in their interest to install expensive pollution abatement equipment when their competitors did not. As a result, they did not act to adequately reduce emissions.

At the same time, the Clean Air Act's regulations require firms to alter their production processes in ways that raise their costs. Indeed, some of my recent research finds that an important set of Clean Air Act rules has raised polluting industries' costs of production by roughly 2.6%. This has reduced firms' profits and led to higher prices for consumers. Further, it has caused regulated firms to scale back their operations, which led to employment losses at those firms.² Although the ultimate effect on the level of jobs in the economy is likely minimal in normal economic times, recent research indicates that workers who lose their jobs due to regulations often face prolonged periods of unemployment and become reemployed at lower wages.³

The challenge then for regulators is to consistently set rules with benefits that exceed their costs.

President Obama has taken steps to instill a commonsense rulemaking process. Through two Executive Orders he required that federal agencies routinely review existing significant regulations in order to "determine whether any such regulations should be modified, streamlined, expanded, or repealed" with the purpose of making the "regulatory program more effective or less burdensome in achieving the regulatory objectives." These reforms offer the promise of finding a better balance between our health and safety, and our economic growth.

To understand why such reviews are so critical, imagine if the Food and Drug Administration approved new drugs without ever having tested them on people — that it approved drugs knowing only in theory how they were likely to affect the human body. Further imagine if such drugs remained on the market for years, or even decades, without their effects ever being subject

¹ Kenneth Chay and Michael Greenstone, "The Impact of Air Pollution on Infant Mortality: Evidence from Geographic Variation in Pollution Shocks Induced by a Recession," *Quarterly Journal of Economics*, 2003, 118(3); Olivier Deschenes, Michael Greenstone and Joseph Shapiro, "Defending Against Environmental Insults: Drugs, Emergencies, Mortality and the NOx Budget Program Emissions Market," Department of Economics, MIT (2013).

² Michael Greenstone, "The Impacts of Environmental Regulations on Industrial Activity: Evidence from the 1970 and 1977 Clean Air Act Amendments and the Census of Manufacturers," *Journal of Political Economy*, 2002, 110(6); Michael Greenstone, John A. List and Chad Syverson "The Effects of Environmental Regulation on the Competitiveness of U.S. Manufacturing," Department of Economics, MIT (2011).

³ Reed Walker, "The Transitional Costs of Sectoral Reallocation: Evidence From the Clean Air Act and the Workforce," *Quarterly Journal of Economics*, 2013, 128(4).

to evaluation. This path is simply inconceivable, but it is how we have historically approached government regulations.

Make no mistake — inadequate regulatory policy can be, as with drug approvals, a life-or-death issue because of the significant role regulations play in every aspect of our daily lives.

A bit of history: U.S. regulations used to be designed essentially in the dark. Then, in 1981, President Ronald Reagan issued an executive order institutionalizing the idea that regulatory action should be implemented only in cases when, among other provisions, “the potential benefits to society for the regulation outweigh the potential costs to society.” It sounds obvious. But this idea of applying cost-benefit analysis in the regulatory arena fundamentally altered the way in which regulations were considered.

In 1993, President Bill Clinton outlined more specific guidelines for prospective analysis of cost-benefit trade-offs. And yet, the regulatory review process was still operating with one hand tied behind its back. As a general matter, a regulation’s likely benefits and costs were considered only before the proposal was enacted — the point when we know the least precisely because the regulations are untested. Consequently, prospective estimates of the costs and benefits must rest on many unverifiable and potentially controversial assumptions.

And, once a regulation passed through a prospective analysis and went on the books, it could remain there for decades without any further evaluation.

Some regulations work out exactly as intended. But some, of course, do not. For example, an air pollutant may prove to be more harmful than was originally understood. Or, a regulation may end up imposing larger costs on businesses than suggested by the prospective analysis. In our rapidly changing world, regulations can and should adapt to change.

To realize this goal, regulators must take a step forward by looking backward. Agencies should routinely reevaluate the costs and benefits of existing regulations and identify whether the goals of a regulation could be achieved through less expensive means.

In the remainder of my statement, I will identify two further changes that would increase the chances that our regulatory system consistently produces rules with benefits that exceed costs. I will then take a brief look at the proposed legislation.

I. Extending Executive Orders 13563 and 13610

The first change is to make three reforms that build on Executive Orders 13563 and 13610.

First, I recommend institutionalizing the retrospective review of economically significant rules in a public way so that these reviews are automatic in nature. In the case of rules that are currently in force, this would mean publicly committing to a retrospective analysis of each existing rule within a pre-specified period. This might be 5 or 10 years, with the length of time depending on the particulars of the rule and the results of any previous reviews.

In the case of new rules, the implementing agency would be required to announce a timetable for review with a maximum allowable amount of time, perhaps 5 or 10 years, with shorter time periods being preferable. In addition, the agency would be required to pre-specify the expected benefits (e.g., reduced child mortality rates) and costs (e.g., reduced business profits) so that the terms of the subsequent review would be known in advance. The agency would also be required to identify how these benefits and costs would be measured, such as the types of data and other information that it anticipates being necessary for review.

Second, the relevant agency should commit to undertaking a new rulemaking when the results from the retrospective analysis differ from the benefits and costs that were expected prior to the rule's implementation. As with the retrospective analysis, there should be a time limit for conducting the new rulemaking. In cases where the realized benefits exceed the costs by a wider margin than expected, there may be further opportunities to maximize net benefits. In cases where the rules are found to be ineffective or unjustified, agencies should identify ways to modify the rules or abandon them. Finally, if the retrospective analysis confirms the original expectation of benefits and costs, then there would not be a need for a new rulemaking.

Third, these efforts would be strengthened if they were accompanied by a triggering mechanism to ensure that retrospective evaluations occur and, when appropriate, for new rulemakings to be undertaken within the prescribed time periods. One approach would be for agencies to announce publicly and post on their website the deadline for a rule's review and reconsideration. A stronger approach would be for judicial action to compel reviews and rulemaking in the cases where an agency has failed to comply with a review timeline or to act upon its results.

II. Creating a Regulatory Analysis Division within the Congressional Budget Office

The second change is to ensure that the quality of the reviews is commensurate with the stakes of getting regulatory policy right. In this spirit, there are some difficulties with the approach I just outlined. Many agencies do not have the staff, expertise, or resources necessary to undertake these reviews. Further, the process of self-evaluation is challenging for all organizations, as it requires complete objectivity. Indeed, history is unkind to organizations that fail to get outside reviews of their work.

My recommendation is to establish a new, independent body for regulatory review. The non-partisan Congressional Budget Office (CBO) provides an appealing model.

As you know, before the CBO was established, only the President had a ready source of budgetary and economic data and analysis. Congress was forced to largely rely on the Office of Management and Budget (OMB) for this sort of information. The CBO was invented to level the playing field. Its analyses allow Congress to consider the economic and budgetary implications of new policy ideas. Crucially, the CBO also helps Congress evaluate the information that it receives from the Executive Branch.⁴

⁴ Congressional Budget Office, "CBO Testimony: Statement of Robert D. Reischauer, Director, Congressional Budget Office, before the Joint Committee on the Organization of Congress" (1993). http://www.cbo.gov/ftpdocs/105xx/doc10580/1993_06_10_mission.pdf

The entire budget process has benefited from CBO's existence. This is a direct result of its independence. The budgetary analyses and proposals of all legislators and Executive agencies are now created to a higher standard, knowing that they must ultimately stand up to scrutiny by the non-partisan CBO.

The creation of a Regulatory Analysis Division in the non-partisan CBO I believe is the best solution, and one originally introduced by Senator Klobuchar in a bill in the last Congress. This Regulatory Analysis Division would be charged with conducting independent regulatory impact evaluations. Some of the organization's activities would be statutory in nature – for example, automatic reviews of economically significant regulations – while other evaluations could be performed at the request of Congressional committees and members.

A Regulatory Analysis Division within the CBO would directly strengthen our regulatory system. Agency analyses would benefit from the scrutiny that they would ultimately receive from this new, independent organization. Further, the results of the retrospective reviews would become part of the agencies' automatic assessments of their regulations that I described above. I believe that providing this type of rigorous, independent review would build confidence within the business community and a better sense of transparency.

Finally, a Regulatory Analysis Division of the CBO could help to increase the credibility of the regulatory evaluations by developing an explicit checklist to determine the rigor of regulatory analyses. A 2011 Hamilton Project paper provides some ideas for a check list.⁵ Such a checklist could also be issued as guidance by the Administration to its agencies. The checklist should favor randomized control trials, the gold standard in terms of evidence, and natural experiments over models and observational studies.

Of course, the creation of a Regulatory Analysis Division would require resources, which are difficult to come by in our current fiscal environment. My best estimate is that it could be funded for less than \$10-15 million annually. To put this in context, the current CBO budget is about \$50 million annually.

This is a very small amount of money when compared to the potential costs and benefits that regulations impose on our economy. Although it is difficult to determine the total number of economically significant regulations that are on the books, the Office of Management and Budget reviewed 540 major regulations between 2001 and 2010⁶, which are defined as having an effect of more than \$100 million on the economy annually—either in costs or benefits. Consequently, it seems safe to conclude that the total costs and benefits of regulations can be measured in the hundreds of billions of dollars annually.

⁵ Ted Gayer, "A Better Approach to Environmental Regulation: Getting the Costs and Benefits Right," Discussion Paper 2011-06, The Hamilton Project, Brookings Institution (2011).

⁶ Office of Information and Regulatory Affairs, Office of Management and Budget, "2011 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities" (2011).

It is apparent that we have a lot at stake economically with regard to our regulatory system and the cost of finding out which parts are working is quite small in comparison. My judgment is that it is very likely that a Regulatory Analysis Division would pay for itself many times over.

By creating a body that can undertake rigorous analysis of the costs and benefits of regulation – both ex-ante and ex-post – policymakers will have better tools for protecting those regulations with great benefits for our society, reforming those regulations that impose unnecessary costs, and potentially culling those that no longer serve their purpose.

III. Conclusion

In conclusion, our regulatory system is a linchpin of our well-being. It allows us to live longer and healthier lives, among many other important impacts. However, these important benefits come with direct economic costs. The purpose of my statement has been to identify some reforms that will help to ensure that our regulatory system does its job in the most cost-effective way possible – in which the benefits to society exceed the costs by the largest margin.

To quickly summarize, I propose two key reforms:

1. Institutionalize a process by which agencies automatically undertake retrospective reviews of regulations and initiate a new rulemaking when the results from the retrospective analysis differ from the expected benefits and costs.
2. Create a Regulatory Analysis Division within the Congressional Budget Office to provide independent reviews.

More generally, I want to offer my strongest encouragement for your committee's investigation of ways to improve the regulatory system. We live in a rapidly changing economy and we need a regulatory system that meets the new and different needs of our society. Several potential reforms of the regulatory system have been suggested in recent years and I expect that many of them would lead to improvements. Whatever legislation the committee decides to pursue, my judgment is that large and fundamental improvements in the regulatory system are not possible without the introduction of regular independent retrospective reviews and mechanisms to ensure that the results of these reviews are used to update regulations. This is the surest path to a regulatory system that efficiently protects the American people and economy.

Thank you once again for inviting me to submit a statement for the record. I would be honored to have the opportunity to answer any questions or provide any additional assistance at a time that is convenient for either of you, the Committee Members, or the relevant staffs.

**Responses to Post-Hearing Questions for the Record
Submitted to Hon. Susan E. Dudley
From Senator Rand Paul**

“A Review of Regulatory Reform Proposals.”

September 16, 2015

- 1. What is your assessment of the efficacy of the Congressional Review Act of 1996 (CRA)? To what extent has the CRA contributed or not contributed to the enhancement of Congressional oversight of the regulatory process?**

Congress has used the CRA to enact a resolution of disapproval only once, overturning an OSHA regulation addressing ergonomics in the workplace. Although resolutions of disapproval require only a simple majority in Congress (and several have passed one house), they face the threat of presidential veto, which would require a two-thirds majority to override. The conditions surrounding the ergonomics regulation were likely key to its disapproval. It was a “midnight regulation,” issued amid much controversy at the end of the Clinton Administration. The resolution disapproving the rule came at the beginning of the Bush Administration (which did not support the rule), eliminating the veto threat.¹

- 2. According to Prof. Shapiro’s testimony, “[f]or many regulatory agencies, the statutes under which they operate have not been reviewed or revised in decades.” Regarding the Regulations from the Executive in Need of Scrutiny (REINS) Act (S. 226), do you believe that it is appropriate to provide current members of Congress with an opportunity to participate in the rulemaking process on behalf of their constituents, particularly with regard to major new rules being promulgated under decades-old statutes?**

Yes.²

- 3. Regarding the Regulations from the Executive in Need of Scrutiny (REINS) Act (S. 226), do you believe that the passage of the REINS Act would influence Congressional accountability? How or how not?**

Yes. Many federal regulations being promulgated today depend on legislation passed decades ago by different congresses focused on different concerns. The REINS Act would ensure that major regulations based on authority delegated years ago could only be adopted with consent from the current Congress.³

It is not clear how legislators would respond to the responsibility of voting on the 50 to 100 major rules promulgated each year. Ideally, the expedited procedures would encourage bipartisan debate and minimize opportunities for a minority of members to derail resolutions supported by the majority. However, some fear that inertia would lead to inaction, and the effective disapproval of popular regulations. Or perhaps joint resolutions of approval would become routine, with members voting for new regulations with little consideration. If resolutions of approval become routine, at least members would no longer be able to blame agencies and avoid responsibility for regulatory outcomes.⁴

4. Regarding the Regulations from the Executive in Need of Scrutiny (REINS) Act (S. 226), do you believe that the passage of the REINS Act would influence accountability on the part of federal regulatory agencies? How or how not?

REINS would likely make regulatory agencies more accountable to elected representatives in Congress, but it would also make regulatory decisions more like legislative decisions, which could result in less transparency. Agency staff might have incentives to negotiate deals with individual legislators and lobbyists, inserting special provisions in new regulations in exchange for an affirmative vote on a resolution of approval. That could affect their willingness to alter proposed regulations in response to public comment, or a president's ability (through OIRA) to hold agencies accountable for selecting alternatives with broad net benefits. Agencies might want to divide a regulation into smaller actions to avoid the "major" designation, or bundle unpopular regulations with popular ones to compel an affirmative resolution.⁵

REINS might make presidents more accountable for regulations issued by independent regulatory agencies, which are not currently subject to presidential oversight. A president presented with a congressional resolution of disapproval would be forced either to sign it (thereby disapproving the rule) or veto it (thereby taking accountability for the rule).

5. Do you believe that in some instances, agency estimates of the benefits of a proposed rule are unduly exaggerated by the inclusion of "co-benefits"? Do you believe that incorporating incidental "co-benefits" contributes to greater transparency in terms of conducting cost-benefit analyses of proposed rules, or does it bias those analyses?

The inclusion of co-benefits overstates the benefits of regulatory actions, and reduces transparency regarding regulatory outcomes of concern. For example, 99% of EPA's estimated benefits for its mercury and air toxics rule (which the Supreme Court struck down recently) derive from reductions in non-hazardous emissions of fine particles (PM_{2.5}), which were not the focus of the regulation and which EPA has authority to regulate more directly – and more cost-effectively – elsewhere.⁶ For more detail on the issue of co-benefits, please see my articles on the topic of co-benefits in *Business Economics*⁷ and *Regulation*.⁸

¹ Susan E. Dudley, *Administrative Law & Regulation: Prospects for Regulatory Reform in 2011*, 12 Engage 7, 7 (2011). <http://www.fed-soc.org/publications/detail/prospects-for-regulatory-reform-in-2011>

² Susan E. Dudley, "Improving Regulatory Accountability: Lessons from the Past and Prospects for the Future," *Case Western Reserve Law Review*, Vol. 65 Issue 4, 2015.

³ Jonathan H. Adler, *The Regulations from the Executive in Need of Scrutiny (REINS) Act*, The Federalist Soc'y for Law & Pub. Policy Studies (Jan. 14, 2011). <http://www.fed-soc.org/publications/detail/the-regulations-from-the-executive-in-need-of-scrutiny-reins-act>

⁴ Dudley 2011

⁵ Dudley 2011

⁶ Dudley, "Justices debate benefits and costs of EPA mercury power plant rule," *The Conversation* (March 11, 2015) <https://theconversation.com/justices-debate-benefits-and-costs-of-epa-mercury-power-plant-rule-39551> and "Supreme Court's EPA mercury ruling is a victory for common sense regulation," *The Conversation* (June 30, 2015) <https://theconversation.com/supreme-courts-epa-mercury-ruling-is-a-victory-for-common-sense-regulation-44073>

⁷ Dudley, "Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation," *Business Economics*, Vol. 47, No. 3. National Association for Business Economics, August 2012.

⁸ Dudley, "OMB's Reported Benefits of Regulation: Too Good to Be True?," *Regulation*, Vol. 36, Number 2. Summer 2013.

Responses to
Post-Hearing Questions for the Record
Submitted to Hon. Susan E. Dudley
From Senator Thomas R. Carper

“A Review of Regulatory Reform Proposals.”

September 16, 2015

1. *All agencies currently are encouraged to issue an Advanced Notice of Proposed Rulemaking (ANPRM) when they believe doing so is likely to make the rule better and more effective. For example, an agency may decide it is helpful to add this additional step when regulating on a new issue, but not when the agency is already very familiar with the subject matter and the issues surrounding the proposed regulation. While I understand that this extra step can sometimes be useful, I worry that requiring ANPRMs for all major rules will only serve make the process less efficient, without improving final regulations.*

Are there other ways that Congress or OMB could help to clarify when an advance notice is useful or improve stakeholder engagement at the early stages of the regulatory process?

An advantage of an advanced notice of proposed rulemaking (ANPR) is that it can share and elicit information from a broad audience (and not just stakeholders who are already well-connected) before an agency embarks on a predetermined path. By the time a notice of proposed rulemaking (NPRM) is issued for public comment, comment is often constrained to a narrow range of options.

Congress or OMB could clarify that the structure of an ANPR need not be as formal as an NPRM, so it can be adapted for different purposes. For example, it might simply ask for information; it might seek feedback on a preliminary risk analysis;¹ or it might present a back-of-the-envelope analysis of the impacts of a wide range of policy options.² This flexibility could ensure that the requirement for an ANPR achieves the goal of engaging diverse experiences and perspectives early enough to improve regulatory policy without unnecessary delay or commitment of resources.

¹ Susan E. Dudley, “Regulatory Science and Policy: A Case Study of the National Ambient Air Quality Standards.” The George Washington University Regulatory Studies Center Working Paper (September 9, 2015.) <http://regulatorystudies.columbian.gwu.edu/regulatory-science-and-policy-case-study-national-ambient-air-quality-standards>

² Christopher Carrigan and Stuart Shapiro, “What’s Wrong with the Back of the Envelope? A Call for Simple (and Timely) Benefit-Cost Analysis.” George Washington University Regulatory Studies Center Working Paper (2014), <http://regulatorystudies.columbian.gwu.edu/whats-wrong-back-envelope-call-simple-and-timely-benefit-cost-analysis>.

2. *It seems that many, if not all, of these bills that were discussed at the hearing would add additional analysis or steps to the regulatory process, either at the front end or when reviewing existing regulations. Agencies are already operating under significant budget restraints.*

a. Do you think agencies will need additional resources to implement these proposals?

I think many of these proposals could be accomplished with more efficient use of resources.

b. In your testimony you talked about reallocating resources from front-end cost-benefit analysis and using those resources to conduct retrospective reviews. Are you concerned that taking already limited resources agencies need to complete the front-end analysis could result in additional delays in promulgating regulations? If we were to do this, what would happen if some of the bills being discussed today that would increase requirements for front-end cost-benefit analysis were also to become law?

Improving retrospective evaluation could provide data and experience that would improve ex ante analysis, thus reducing the resource-intensive hypothetical modeling currently undertaken for many major rules. Using the value-of-information (VoI) concept, evaluation could focus resources and attention on the most important questions. VoI is a decision analysis concept that examines how much reducing a particular uncertainty would improve a decision. In the regulatory context, policy makers would use evaluation tools to target the most salient questions to address, thus improving decisions efficiently. For example, designing regulations up front to allow for natural experiments would generate information with relatively fewer resources than current practices.

**Post-Hearing Questions for the Record
Submitted to Sidney A. Shapiro**

“A Review of Regulatory Reform Proposals.”

September 16, 2015

Senator Thomas R. Carper:

1. In your testimony you discuss delays in the regulatory process, and lay out a timeline showing that the process for adoption of significant rules can take four to eight years at best. Our Committee Members worked on a bipartisan basis earlier this year to support a bill introduced by Senators Portman and McCaskill that aims to streamline the federal permitting process and make it more efficient. But I worry that many of these proposals that were discussed at the hearing would do the exact opposite with regulations.

What do you think can be done to address this issue of regulatory delay and ensure the regulatory process is working both efficiently and effectively? And do you believe that there are currently any legislative proposals that would help address this issue of regulatory delay by helping to make the regulatory process more efficient?

The crux of the problem that agencies face when they undertake a rulemaking that is authorized or mandated by Congress is that while they face a growing number of procedural and analytical barriers they must overcome to complete the rulemaking, their budgetary resources are being reduced or held constant. Simply put, each rulemaking involves a classic problem of agencies being forced to do more with less.

Fortunately, the public servants who work at these agencies are experts in their respective fields, dedicated to advancing the public interest, and committed to fulfilling their agencies' respective statutory missions. As such, they are still able to accomplish a lot of good under very, very difficult circumstances. That being said, there is still much that Congress can and should do to help.

First and foremost, Congress needs to provide these agencies with enhanced budgetary resources and greater budgetary certainty. Among other things, this would include abandoning the punitive and fiscally problematic sequestration-based budget caps on domestic discretionary funding and authorizing budgetary resources that provide agencies with the resources they need to fulfill their statutory missions. The FDA's experience with implementing the Food Safety Modernization Act provides one dramatic example of the problematic impact that inadequate budgets can have on agencies' ability to issue congressionally-mandated safeguards. The Congressional Budget Office estimated that the FDA would require \$583 million in additional funding to properly implement the statute. Instead, Congress has only provided \$162 million—just over a quarter of what is needed.¹ It should hardly come as any surprise, then, that several of the key rulemakings under the statute were issued or will be issued more than four years past the

¹ http://www.foodsafetynews.com/2015/03/the-future-is-now-for-the-food-safety-modernization-act/#.Vhffq_1VhBd

statutory deadlines that Congress set out. This delay—this failure to carry out clear statutory instructions—should be of grave concern to Congress.

Second, Congress should investigate the current stock of analytical and procedural requirements that are agencies are subject to when developing new regulatory safeguards. It should identify and eliminate those that are duplicative or are unnecessary for ensuring quality regulatory decision-making. In conducting this investigation, Congress should recognize that often agencies are able to accomplish the goals of many of these procedures and analyses in the absence of specific requirements, and that agencies should be permitted the leeway to conduct these procedures and analyses voluntarily and in a fashion that is tailored to the unique circumstances of each rulemaking. To take one notable example, in 1973 rulemaking to reduce the lead content of gasoline, the EPA specifically set up an extended compliance timeline for smaller refineries in response to comments it had received from the refining industry.² The agency included this concession seven years before the Regulatory Flexibility Act became law.

I am unaware of any current legislative proposals that would bring much needed reforms for addressing delay and inefficiency in the rulemaking process. I support and have written in favor of specific proposals for reforming the Regulatory Flexibility Act and the OIRA review process—two key sources of regulatory delay.³ At your request, I would be happy to discuss these specific proposals with the Committee in greater detail.

To be clear, I am not opposed to *ex ante* analyses of pending rulemakings. It is, however, necessary to approach them with a proper appreciation for their limitations. Indeed, these analyses will involve a great deal of uncertainty and must be viewed as providing a very rough prediction of potential regulatory impacts. Consequently, a better approach to rulemaking might be one that favors *ex post* analyses and adjustments. As I noted in my testimony, most agencies have the authority to make these adjustments. This Committee should explore additional opportunities for ensuring that all agencies have the necessary authority for adjusting implementation of their completed rules to avoid undue burdens or other unintended consequences. Likewise, many of the legislative proposals considered during the hearing centered on retrospective evaluations of existing rules. By and large, a shift from *ex ante* analyses to retrospective review seems to be a more promising approach to ensuring an effective rulemaking system in which the principles of accountability, fairness, and productivity are properly balanced. To be successful, an increased emphasis on retrospective review will require the following: adequate budgetary resources for agencies to carry the reviews out; the elimination of unnecessary *ex ante* analyses; and sufficient flexibility for agencies to tailor the retrospective review process to the unique characteristics of each specific rule.

2. It seems that many, if not all, of these bills that were discussed at the hearing would add additional analysis or steps to the regulatory process, either at the front end or when reviewing existing regulations. Agencies are already operating under significant budget restraints. Do you think agencies will need additional resources to implement these

² <http://www2.epa.gov/aboutepa/epa-requires-phase-out-lead-all-grades-gasoline>

³ http://www.progressivereform.org/articles/SBA_Office_of_Advocacy_1302.pdf;
http://www.progressivereform.org/articles/OIRA_Meetings_1111.pdf

proposals? If Congress passes these proposals but does not provide additional resources, do you think it would result in additional regulatory delays?

As noted above, agencies already lack the budgetary resources for carrying out rulemakings facing just the current stock of analytical and procedural requirements. Additional budgetary resources would be needed to carry out these currently existing requirements and any additional requirements that Congress elects to add. Without these additional resources, continued and worsened delays in pending rulemakings will be the inevitable result. These delays might help the bottom lines of the business community, but the costs they impose will continue to be borne by the public in terms of premature deaths, cancers that are not averted, missed work and school days, and money wasted. By definition, of course, all of these costs are avoidable and should be avoided.

Thus, at a minimum, whenever this Committee considers these or other proposals to add more analytical and procedural requirements to the rulemaking process, it should identify the budgetary resources agencies will need to carry those requirements out and then ensure that these resources are provided. Alternatively, the Committee could explore opportunities for removing existing requirements that have greater than or equal to budgetary impacts on agencies before adding new ones. In particular, as noted above, the Committee should explore the elimination of *ex ante* analytical and procedural requirements in concert with the addition of retrospective review procedures.

3. I know supporters of requiring independent agencies to conduct cost-benefit analysis and submit that analysis to OIRA believe these independent agencies are not conducting a thorough analysis of their regulations. However, it is my understanding that many of these agencies actually do conduct significant regulatory analysis; it just may be slightly different than the analysis required of the executive agencies.

What are your thoughts on whether or not independent agencies generally conduct a thorough regulatory analysis? Are there any studies that have looked into this issue?

I believe there is a profound misunderstanding about the issue of regulatory analysis and independent agencies, and this misunderstanding stems from the fact that many people improperly conflate the concept of regulatory analysis with an evaluative tool known as “cost-benefit analysis.” Significantly, there are many forms of regulatory analysis, and cost-benefit analysis is arguably not even the best one, or even perhaps an objectively good or useful one.

Cost-benefit analysis denotes a highly stylized a form of analysis in which one attempts first to quantify and monetize all the costs and benefits of a full range of potential regulatory options. Relying on this information, the analyst then must attempt to identify the “economically optimal” regulatory solution—or that regulation for which the marginal costs are equal to the marginal benefits. Needless to say, many regulatory experts agree that this analysis is neither sound in theory nor meaningful in practice.⁴ In general, this form of analysis is flawed because it is rarely relevant to the statutes under which independent agencies operate (*i.e.*, few of these

⁴ <http://www.progressivereform.org/regulatingfromnowhere.cfm>; <http://progressivereform.org/priceless.cfm>

agencies are charged with finding economically optimal regulatory solutions). Moreover, various methodological flaws lead to a systematic over-counting of regulating costs while under-counting regulatory benefits, resulting in a skewed portrayal of regulatory safeguards.

Despite the flaws of cost-benefit analysis, the reality is that most independent agencies perform variations of this form of analysis on their biggest rules in most cases, as found in a 2013 study conducted by regulatory policy expert Curtis Copeland on behalf of the Administrative Conference of the United States.⁵ These agencies perform these analyses either to fulfill statutory mandates, or as a voluntary effort.

By definition—and more importantly—a regulatory analysis requirement exists in every statute under which independent agencies operate. The statutory standard itself tells these agencies what regulatory impacts to consider (including both costs and benefits) and how to compare and balance these impacts when deciding whether and how to regulate. In short, every regulation an independent agency issues must undergo a rigorous regulatory impact analysis by virtue of the statutory standard under which the regulation is issued.

To be sure, members of Congress may not agree with the current statutory standards and the specific regulatory analyses requirements they impose on independent agencies. If that is the case, then the better solution would be for this Committee to work with the relevant Committees of jurisdiction to revise those statutory standards to encompass a different set of regulatory impact analyses. By following a more focused approach to this issue, this Committee would be better able to tailor the specific statutory standard to the unique mission and conditions that each independent agency faces. This focused approach is far superior to applying a one-size-fits-all super-mandate that covers all independent agencies and that fails to account for each independent agency's unique circumstances.

4. All agencies currently are encouraged to issue an advanced notice of proposed rulemaking when they believe doing so is likely to make the rule better and more effective. For example, an agency may decide it is helpful to add this additional step when regulating on a new issue, but not when the agency is already very familiar with the subject matter and the issues surrounding the proposed regulation.

In your testimony you discuss the length of time it already takes to bring a regulation through the current process. How much additional time would a major rulemaking take if all agencies were required to issue these advanced notices for their major rules?

The advanced notice of proposed rulemaking plays a unique role in the rulemaking process. As such, it does not make sense to impose a blanket requirement that agencies undertake this process for all of their larger rules in instances beyond which an advanced notice would serve a legitimate purpose. Instead, such a requirement would merely amount to process for process sake, resulting in needless delays of regulatory safeguards and the waste of scarce agency resources. Previous experience with advanced notice of proposed rulemakings suggests

⁵ <https://www.acus.gov/sites/default/files/documents/Copeland%20Final%20BCA%20Report%204-30-13.pdf>

that complying with this requirement might add anywhere between six months to a year to each rulemaking.

Simply put, the purpose of an advanced notice of rulemaking is to enable an agency to gather information that it needs for determining whether and how to undertake a potential rulemaking action. By and large, the legislative language in the authorizing statute combined with the agencies' expertise in the subject matter area implicated by a rulemaking usually affords the agency sufficient information to assemble a proposed rulemaking. Of course, this is not always the case. In such instances, agencies have demonstrated that they are willing to undertake the step of advanced notice of their own volition. After all, the threat of judicial review provides agencies a strong incentive to ensure that any proposal they issue is likely to lead to a final rule that can survive legal challenge. When in doubt, an agency will thus have a strong incentive to employ an advanced notice that would inform its proposal.

Even if an agency does proceed to a proposal that is revealed to be inadequate during the notice and comment process, it is still free to refine the proposal through a supplemental notice of proposed rulemaking or even a new proposal. Again, agencies have demonstrated time and again that they will take this route rather than risk having a rule struck on judicial review. Some recent examples include such high profile rules as all of the major FDA rulemakings under the Food Safety Modernization Act, the EPA's performance standards for limiting greenhouse gases from new power plants, the EPA's e-Reporting rule for NPDES permits under the Clean Water Act, and the EPA's coal ash rule.

Senator Claire McCaskill:

One of the regulatory reform proposals discussed at the hearing was S. 1607, the Independent Agency Regulatory Analysis Act. The bill would subject regulations promulgated by independent agency to review by the Office of Information and Regulatory Affairs (OIRA), although OIRA's analysis would not be binding on the agencies.

Q. How do you think this might affect the independence of these independent agencies?

Even if technically “non-binding”, the reality is that OIRA's assessments of the independent agencies' rules would still provide the White House with a powerful conduit for exerting control over those agencies' regulatory decision-making. The problem is the provision in S. 1607 which requires that the rulemaking record for a particular rule include both any analyses performed by independent agencies, as well as OIRA's assessment during its review of the rule. Over the years, judicial review of agency rulemakings has evolved such that it is now focused on the requirement that agencies provide “adequate reasons” for the adoption of a rule.⁶ Once the independent agency's analyses undertaken and OIRA's assessment are made part of the rulemaking record, a judge is free to decide that the agency has failed to provide an adequate explanation for its rule because of defects or inadequacies in the analyses. The judge, of course, would be free to cite OIRA's assessment in identifying those defects or inadequacies.

Many of the analyses that independent agencies must undertake pursuant to S. 1607 will involve a great deal of uncertainty, particularly those analyses that involve an assessment of a rule's predicted monetized costs and benefits. Such cost-benefit studies are often imprecise because of the uncertainties involved in making monetary estimates, particularly of benefits. Because there is no definition of what constitutes an adequate explanation, judges skeptical of regulation can treat the uncertainty involved in making cost-benefit estimates as a lack of an adequate explanation. Industry groups therefore have a strong incentive to challenge as many aspects of the independent agency's various analyses as possible as part of their litigation strategy. Presiding judges would likewise have greater opportunities to substitute their non-expert judgment on complex matters of science, technology, and economics for that of the experts at the independent agencies to justify blocking rules that they are opposed to for political or other improper reasons.

Independent agencies will recognize the threat that negative or unfavorable OIRA analyses pose for their rules on judicial review, and they will go to great lengths to avoid them, including changing the substance of their rules or undertaking additional analysis to satisfy OIRA's criticisms. This in turn would give the White House significant influence over the nature and scope of these proposed rules. As this pattern becomes more entrenched, the influence that the President would acquire over independent agencies' regulatory decision-making would necessarily increase. Moreover, because White House oversight often reflects political motivations, the existence of OIRA review of independent agencies' rules and analyses would give the White House an opportunity to politicize independent agencies that does not now exist.

⁶ See Sidney A. Shapiro & Richard E. Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387.

Another regulatory reform proposal that has been discussed is S. 708, the Regulatory Improvement Act. The bill would establish a BRAC-like commission to review the regulations of every federal agency and determine whether some regulations are overly-burdensome and should be repealed or modified. The commission would be given just 1 year to review every federal regulation from every federal agency and reach conclusions about them.

- Q. Do you think it is feasible, under this timeframe, for such a commission to gain the expertise and conduct the analysis necessary to conduct a credible investigation of this magnitude?

I do not believe that one year provides a feasible timeframe for conducting an effective review of the existing stock of regulations. The reality is that the handful of individuals that would part of such a commission would need to acquire a lot of expertise over some very complicated technical and scientific matters in order to make informed decisions about what kind rules should be repealed or modified. Frankly, I'm skeptical that any amount of time would be sufficient to acquire an adequate level of expertise.

The risk of such an expedited timeframe is that it would make the members of commission overly dependent upon outside stakeholders for developing their recommendations. The history of the regulatory process demonstrates that corporate interests far dominate such stakeholder processes to the exclusion of public interest groups. This increases the risk that the commission's ultimate recommendations would reflect the narrow concerns of corporate interests, while giving short shrift to the legitimate concerns of safeguarding public health and the environment.

- Q. What do you think about establishing a permanent office of regulatory review within each agency that could utilize the agency's in-house expertise to conduct ongoing reviews of regulations?

An in-house office regulatory review office seems to offer a preferable alternative to an independent regulatory review commission. The permanent in-house office would provide greater subject matter expertise on the technical and scientific issues related to the individual rules, as well as possess a practical understanding of how the various regulatory programs fit together to advance the agency's particular statutory mission. In this way, an in-house office would be better positioned to identify the proper way to eliminate or modify existing rules without unduly undermining the effectiveness of other regulatory programs that remain vital to the public interest.

Such a permanent office would require additional budgetary resources, so as not to undermine each agency's ability to address in an effective and timely manner any new or emerging threats. In addition, a greater focus on retrospective review would justify the reduction in *ex ante* analytical and procedural requirements that currently bog down the rulemaking process.

Q. How would you assess the impact of the Obama Administration's regulatory review?

In my estimation, the regulatory review process that agencies have conducted pursuant to Executive Order 13563 has been a tremendous success, particularly given the constraints that these agencies have faced during the period in which the order has been in effect. In his most recent update last March, OIRA Administrator Howard Shelanski announced that the retrospective review program is on pace to reduce regulatory costs by \$20 billion and paperwork burdens by more than 100 million hours.⁷ Importantly, these savings have been achieved without undermining vital public protections. In many cases, the savings have been achieved by modernizing existing programs to make them easier and cheaper to implement—both for the private sector and administrative agencies. For example, agencies have been diligently replacing paper-based reporting processes with electronic ones that are much more efficient. Agencies have made this progress despite facing cuts to their budgetary resources, unprecedented political attacks from industry and certain policymakers, and near-constant uncertainty stemming from yjr ongoing threats of government shutdowns.

Undoubtedly, these results do not go far enough for industry, many of which would like to see all of the regulatory burdens they find inconvenient to be cleared out of their way. Retrospective review, however, cannot be used as an excuse for eliminating crucial safeguards for the public and the environment. It is telling that the corporate interest groups that complain most about the supposed ineffectiveness of the Obama Administration's retrospective review program are never able to identify existing rules that can be eliminated without putting people and the environment at unacceptable risk. Instead, they resort to speaking vaguely about excessive regulatory burdens or else they cite to pending rulemakings that are under development or have yet to be implemented.

⁷ <https://www.whitehouse.gov/blog/2015/03/17/accelerating-progress-and-institutionalizing-retrospective-review-1>

Senator Rand Paul:

1. In your prepared testimony, you state: “For many regulatory agencies, the statutes under which they operate have not been reviewed or revised in decades.” Please provide the Committee with as much additional detail as possible regarding which regulatory agencies (both within the executive branch and independently) are operating under decades-old enacting statutes.

Among the existing statutes that could benefit from updates to address new and emerging threats to public health, safety, and the environment are the following:

- Clean Air Act. The last major revisions to the Clean Air Act came in 1990. The Clean Air Act would benefit from amendments that provide the EPA with enhanced authority to tackle emissions of climate disrupting air pollutants, including carbon dioxide, from the major emitters of these sources. These amendments should aim to provide the agency with the ability to tackle the problem global climate change in an effective and cost-effective manner.
- Clean Water Act. The last major revisions to the Clean Water Act came in 1987. The Clean Water Act would be improved by strengthening its provisions to address pollution from non-point sources, including industrial agriculture and livestock operations and new and modified suburban and urban land development. The law would also benefit from amendments aimed at addressing water quality issues tied to climate change mitigation and adaptation. Among other things, these amendments should aim to give EPA greater authority to protect water quality by focusing on ecosystem-wide and watershed-based approaches.⁸
- Safe Drinking Water Act. The last major revisions to the Safe Drinking Water Act came in 1996. The Safe Drinking Water Act could be improved by enhancing the EPA’s authority to prioritize public health over industry profits. As currently drafted, the bill makes it too difficult for the agency to offer strong protections. The law would also be strengthened by restoring and strengthening the EPA’s authority to protect underground drinking water sources from unconventional oil and gas development. The law would be strengthened with provisions aimed at protecting drinking water sources from threats associated with climate change.
- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The last major revisions to FIFRA came in 1996. FIFRA would be improved with revisions aimed at tackling any new and emerging threats posed by the use of nanotechnology in pesticides. The law would also benefit from strengthened provisions to protect pollinators against harms associated with pesticide use. The law would also benefit from stronger protections for agriculture workers who, along with their families, are often exposed to dangerous pesticides.
- Toxic Substances Control Act (TSCA). TSCA has not been significantly updated since it was enacted in 1976, even though it has been woefully ineffective in protecting people and the environment against harmful chemicals. It is encouraging that Congress is considering a series of bills to overhaul the law, but the leading proposals may not go far

⁸ For more on progressive Clean Water Act reform, see here:
http://www.progressivereform.org/articles/CW_Blueprint_802.pdf

enough to provide meaningful protections. A revised TSCA should provide EPA with great authority to regulate or ban the use of chemicals that pose a risk to public health and the environment, and to do so quickly. The law would also benefit from provisions that make it easier for the EPA to ensure the safety of new chemicals before they come on the market. TSCA would also be improved if it provided the EPA with enhanced authority to obtain health and safety data on both existing and new chemicals, and if it set strict deadlines for the EPA to review existing chemicals. TSCA should also be amended to impose user fees on the chemical industry, which would provide the EPA with the necessary budgetary resources to ensure the effective implementation of its provisions.⁹

- Resource Conservation and Recovery Act (RCRA). The last major revisions to RCRA came in 1986. RCRA would benefit from revisions aimed at ensuring proper storage of waste streams generated by industrial agriculture and livestock operations. The law would be improved if it were amended to provide the EPA with greater authority to protect people and the environment from risks associated with the disposal of wastes related to unconventional oil and gas development. The law may also need to be updated to address special risks associated with the disposal of wastes containing nanomaterials.
- Endangered Species Act. The last significant revisions to the Endangered Species Act came in 1988. The Endangered Species Act would be improved with provisions aimed at protecting species from the unique threats posed by climate change. The Endangered Species Act could be improved if the wildlife agencies had enhanced authority to design recovery plans for listed species to facilitate adaptation. Revisions to the law could include enhanced authority to take an ecosystem-wide approach to species protection, which would allow for simultaneous protection of multiple species.
- Oil Pollution Act. The Oil Pollution Act has not been significantly updated since it was enacted in 1990. The Oil Pollution Act would benefit from revisions based on lessons learned from the BP Oil Spill. These revisions should address how liability is assessed for offshore oil spills and to improve planning and response to potential oil spills.
- Occupational Safety and Health Act. The Occupational Safety and Health Act has not been significantly updated since it was enacted in 1970. By and large, the law has not provided adequate protections for most workers and is in drastic need of an overhaul. The Occupational Safety and Health Act should be reformed to provide OSHA with significantly greater enforcement powers to punish employers that violate the law and deter others from following suit. The law should also be revised to give OSHA greater authority to enact new regulations and standards to provide robust protections for workers against common workplace hazards. The Occupational Safety and Health Act should also be revised to empower workers, including enhanced training requirements, better whistleblower protections, and citizen suit authority. Specific revisions should also be aimed at addressing the unique health and safety risks faced by contingent workers.¹⁰

⁹ For more on progressive TSCA reform, see here:

http://www.progressivereform.org/articles/Reforming_TSCA_1307full.pdf

¹⁰ For more on progressive Occupational Safety and Health Act reform, see the following:

http://www.progressivereform.org/articles/Next_Generation_OSHA_1207.pdf;

http://www.progressivereform.org/articles/Contingent_Workers_1301.pdf